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THE CHINESE AMERICAN CHALLENGE TO COURT-MANDATED QUOTAS IN SAN FRANCISCO'S PUBLIC SCHOOLS: NOTES FROM A (PARTISAN) PARTICIPANT-OBSERVER

David I. Levine*

I. INTRODUCTION

Since 1994, I have been involved in a high-profile lawsuit, *Ho v. San Francisco Unified School District*.¹ This suit challenges the constitutionality of a 1983 consent decree mandating quotas on the assignment of children to all public schools in San Francisco on the basis of their race or ethnicity.² As one of the first suits brought by Asian Americans against a court-ordered desegregation plan,³ it has generated considerable scholarly⁴ and

* Professor of Law, University of California, Hastings College of the Law; Co-counsel for plaintiffs in *Ho v. San Francisco Unified School District*, No. C-94-2418-WHO (N.D. Cal.). The author has acted in a private capacity in working with the able attorneys of Girard & Green LLP to represent the *Ho* plaintiffs. In this Article, however, the author is writing as a professor of law. All comments and conclusions expressed in this Article are the author's alone and should not be treated as stating any position on behalf of the *Ho* plaintiffs, Girard & Green LLP, or of Hastings. Because of the author's role as co-counsel, the discussion and comments are limited to matters in the public record or within the author's personal and unprivileged knowledge. Mark Aaronson, Vik Amar, Marsha N. Cohen, Daniel C. Girard, David J. Jung, Richard D. Kahlenberg, Anthony K. Lee, Adeline G. Levine, Shauna Marshall, Melissa L. Nelken, David Schoenbrod, Louis B. Schwartz, Joanna K. Weinberg, and John Choon Yoo provided very useful suggestions and comments on earlier drafts of this Article. Mary Glennon, Stacy Tyler, and Adam Halpern have provided helpful research assistance in the preparation of this Article.

1. 965 F. Supp. 1316 (N.D. Cal. 1997) (denying motion for summary judgment); 147 F.3d 854 (9th Cir. 1998) (establishing burden of proof at trial); 59 F. Supp. 2d 1021 (N.D. Cal. 1999) (approving settlement). Although it is commonly known as the "Lowell High School case," in fact, the *Ho* plaintiffs challenged the assignment plan for all of San Francisco's public schools. See *infra* notes 124-129 and accompanying text.
2. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983) (approving consent decree). In brief, the consent decree recognized nine racial and/or ethnic groups and provided that no one group would constitute more than 45% of the enrollment at any San Francisco public school. The court described this as the "sine qua non" of the decree. *Id.* at 37. For other details of the decree, see *infra* Part II.B.
3. See, e.g., Caitlin M. Liu, *Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan*, 5 *ASIAN L.J.* 341, 351 (1998) ("[T]he *Ho* case is surely a harbinger of greater difficulties to come in formulating any future race-conscious public

policies."); see also HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* 291 (2000) ("The battleground over affirmative action is a prime example of how the purported opinions of Asian Americans were bandied about by white and black pundits as a prominent part of the debate, while the Asian American community's voice was missing."); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995) (arguing for the consideration of many minority groups in analyzing who to include in law school's affirmative action program); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 893 (1998) ("Especially in California, the hue and cry over the loss of 'diversity' after the end of affirmative action overlooks a crucial racial dynamic. The abolition of racial preferences has increased rather than decreased Asian-American access to that state's public universities. Seen in this light, the whole project reeks of a wildlife management plan for controlling 'exotics.'"); Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 155 (1994) ("What I have written so far should shatter any illusion that American immigrants from Asia respond monolithically to whatever common legacy of discrimination they may share Looks do not equal voice."); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 130 n.6, 162 (1996) (listing bibliography on affirmative action and Asian Pacific Americans, then arguing, "The affirmative action debate affords APAs [Asian Pacific Americans] a unique opportunity to re-vision a multiracial democracy."); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 893 n.2 (1994) ("[T]he failure to focus sufficiently upon alternative minority groups is the single most serious weakness in the race literature."); Lance T. Izumi, *Confounding the Paradigm: Asian Americans and Race Preferences*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 121 (1997) (Asian Americans are "odd men out" in black/white paradigm); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) ("Dworkin's theory justifying affirmative action for certain minority groups . . . can authorize what I call negative action against Asian Americans."); William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. (forthcoming 2000) (manuscript at 48, on file with the author) (seeking a "more sophisticated understanding of how to situate APA law school candidates in the larger meritocracy debate"); Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 271, 271 (Robert Post & Michael Rogin eds., 1998) ("[A] more complex and nuanced understanding of the affirmative action debate needs to be attentive to how distinct political positions socially construct and represent Asian Americans."); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995); Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 626 (1996-1997) ("Since affirmative action can be both harmful and helpful to Asian Americans, it is imperative that they be included in the debate."); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2408 (1999) ("Asian Americans play a strange and contorted role in the affirmative action debate."); James Lindgren, *Seeing Colors*, 81 CAL. L. REV. 1059, 1082 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)) (considering "over-representation" of Jews at Ivy League schools, and noting a history of discrimination against successful minorities); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1629 (1999) (book review) ("[T]he cost of racial double standards in admissions is currently being paid by many Asian students.").

4. See, e.g., ANGELO N. ANCHETA, RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE 149-51 (1998); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE 27-33 *passim* (1999); Kathleen Ann Uradnik, Government by Consent Decree: San Francisco's Struggle for Institutional Reform 62-140 (1998) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author); Liu, *supra* note 3; Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95

popular⁵ attention. A settlement of the case has been approved by the court.⁶ The time has come to discuss the issues in the case from my perspective as a legal scholar who has also been an active participant in the litigation. The unique issues raised in the *Ho* suit will certainly continue to be relevant as affirmative action⁷ in general, and other court-ordered desegregation plans in particular, come under further scrutiny in the legal, political and academic realms.

This Article discusses the important events in the case and offers the author's reflections on how the case fits into the affirmative action debate

MICH. L. REV. 821 (1997) (discussing the *Ho* case in light of critical race theory); Selena Dong, Note, "Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action, 47 STAN. L. REV. 1027 (1995); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Intermorality Group Conflict*, 47 STAN. L. REV. 1059 (1995); Haeryung Shin, Note, *Safety in Numbers? Equal Protection, Desegregation, and Discrimination: School Desegregation in a Multi-Cultural Society*, 82 CORNELL L. REV. 182, 183 (1996) (calling the case "ironic and inevitable").

5. See, e.g., Henry Der, *The Asian American Factor in the Affirmative Action Debate: Victim or Shortsighted Beneficiary of Race-Conscious Remedies?*, in COMMON GROUND: PERSPECTIVES ON AFFIRMATIVE ACTION AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (LEAP Asian Pacific American Public Policy Institute ed., 1996) (highly critical discussion of the *Ho* suit); Norimitsu Onishi, *Affirmative Action: Choosing Sides*, N.Y. TIMES, Mar. 31, 1996 § 4A (Education Life Supplement), at 26 ("Almost all of the national Asian-American civil rights organizations publicly support race-based affirmative action but admit that they do not have the grass-roots support that their African-American and Hispanic counterparts do. The Organization of Chinese Americans, a lobbying group . . . , endorsed affirmative action in higher education. But it has refrained from taking a position in the Lowell High School case . . . [which] the group's executive director [called] 'one of the most emotional and divisive issues in the organization's history.'"); Mary Curtius, *S.F. Schools Seek Ethnic Balance Without Using Race Diversity*, L.A. TIMES, Jan. 3, 2000, at A3 ("[San Francisco is] really on the cutting edge . . ."); Caroline Hendrie, *San Francisco Desegregation Decree to End*, EDUC. WK., Feb. 24, 1999, at 1; Mamie Huey, *Chinese Americans Have Bone to Pick with Consent Decree*, ASIANWEEK, Jan. 27, 1995, at 5; Sarah Lubman, *Asians Say They Must Outscore Others Under School Admissions Criteria*, ASIAN WALL ST. J., July 24, 1995, at 5; Michael W. Lynch, *San Francisco's Chinese Wall*, J. AM. CITIZENSHIP POL'Y REV., May-June 1997, at 6; Hannah Nordhaus, *Consent Decree Battle Exposes Rifts in Rights Groups' Agendas*, S.F. RECORDER, Jan. 12, 1995, at 1; Frank H. Wu, *At Lowell High, Who Is Equal to Whom?*, S.F. CHRON., Sept. 21, 1994, at A23; John C. Yoo & Eric M. George, *When Desegregation Turns Into Discrimination*, WALL ST. J., May 26, 1998, at A18; G. Pascal Zachary, *Class Action: Need, as a Substitute for Race Preferences, Is Just as Hot an Issue*, WALL ST. J., Apr. 10, 1997, at A1.
6. See *San Francisco NAACP*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).
7. David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 922 (1996), has observed that "for all the debate about affirmative action, there is little discussion, let alone agreement, on what the term means." Professor Oppenheimer identified five principal methods of carrying out affirmative action in employment, school admissions, and public contracting: (a) quotas (absolute floors or ceilings for women or minorities); (b) preferences (allowing consideration of race, sex or ethnicity as criteria for selections); (c) self-studies leading to goals and timetables; (d) outreach and counseling to increase the pool of applicants; and (e) anti-discrimination policies, such as implementing diversity or anti-harassment training. See *id.* at 926-33. In this Article, references to "affirmative action" are best understood as meaning quotas, preferences or other race-conscious decision making processes. For a collection of citations to the voluminous literature on affirmative action, see Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999).

today. Part II reviews the most relevant race-discrimination cases brought against the school district prior to the *Ho* case, especially *San Francisco NAACP v. San Francisco Unified School District*,⁸ which led in 1983 to the entry of the consent decree challenged in *Ho*. Part II also reviews the experience under the consent decree and describes the events leading to the decision of some Chinese American parents to challenge the consent decree. Part III describes how *Ho v. San Francisco Unified School District* came about in 1994, and the highlights of the highly contentious litigation since then, which culminated in a settlement and modification of the decree on the very day trial was to begin in February 1999. Part III also describes the controversy over the new race-conscious plan the school district proposed in the fall of 1999 as a substitute for the quotas it utilized for fifteen years under the consent decree and agreed to discard as a part of the settlement. The district court rejected the proposed plan in December 1999; at this time, the school district has said it may appeal that decision. Part IV adds to the scholarly debate on the future of court-mandated affirmative action by offering reflections on some of the important issues the *Ho* suit raises.

II. THE PRECURSORS TO THE *HO* ACTION

A. Early Cases Against the San Francisco Unified School District

The story of the *Ho* suit starts with earlier civil actions brought on behalf of minority students in the San Francisco public schools. The plaintiffs in those earlier cases structured their complaints as fairly standard race-discrimination civil actions. The first, *Johnson v. San Francisco Unified School District*,⁹ was commenced in 1969 on behalf of African American elementary school students. Upon finding that the school district ("SFUSD") had practiced what at the time was viewed as illegal segregation, the trial court ordered the implementation of a plan to desegregate the elementary schools in San Francisco. On appeal, however, the Ninth Circuit reversed on the issue of liability because it found that the intervening case law had made clear that evidence showing de facto segregation only was not sufficient to support a court-ordered desegregation remedy.¹⁰ The Circuit permitted the plan to stay in place pending further proceedings in the district court.¹¹ The *Johnson* plaintiffs apparently made

8. 576 F. Supp. 34 (N.D. Cal. 1983).

9. 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated*, 500 F.2d 349 (9th Cir. 1974). For discussion of *Johnson*, see DAVID L. KIRP, JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION 82-116 (1982).

10. See *Johnson*, 500 F.2d 349 (9th Cir. 1974). The intervening cases were *Keyes v. School District No. 1*, 413 U.S. 189 (1973) and *Soria v. Oxnard School District*, 488 F.2d 579 (9th Cir. 1973). Under *Soria*'s interpretation of the Supreme Court's mandate in *Keyes*, the plaintiffs had to prove that the school district had "intentionally discriminated against minority students by practicing a deliberate policy of racial segregation." *Johnson*, 500 F.2d at 351 (quoting *Soria*, 488 F.2d at 585).

11. In a foreshadowing of the *Ho* litigation, the circuit panel also ordered the intervention of Chinese American parents because their interests were not represented in *Johnson* by either the black plaintiffs, the school district authorities or a group of mixed race parents who had been permitted to intervene earlier. See *Johnson*, 500 F.2d at 352-54.

no effort to make the evidentiary showing that the Ninth Circuit said would be required on remand. In 1978, the district court dismissed the action sua sponte for mootness and failure to prosecute.¹²

In 1972, while *Johnson* was pending, the NAACP initiated *O'Neil v. San Francisco Unified School District*¹³ on behalf of African American secondary school students. The plaintiffs dismissed the action voluntarily without prejudice in 1976.¹⁴ It is possible that the plaintiffs chose to dismiss the suit because it suffered from the same proof problems that prevented *Johnson* from going any further after remand.¹⁵

B. *San Francisco NAACP v. San Francisco Unified School District*

Despite the mixed success achieved by the first two cases, the San Francisco branch of the NAACP ("SFNAACP") brought a third action in 1978.¹⁶ This action, styled *San Francisco NAACP v. San Francisco Unified School District*, was even broader in scope than the earlier cases. The SFNAACP, on behalf of its membership and individual parents of African American children, once again alleged *de jure* segregation in secondary and elementary schools in San Francisco.¹⁷ The SFNAACP also alleged that state as well as local entities and officials were responsible for the segregation.¹⁸ Finally, and probably most boldly, the SFNAACP also sought relief on behalf of *all* children of school age of any race or ethnicity who were or might become eligible to attend public schools in San Francisco and who were entitled to full and equal protection of the law.¹⁹ After five years of litigation, this civil action culminated in the consent decree that the *Ho* suit later challenged.

In his opinion approving the SFNAACP consent decree, Judge William H. Orrick, Jr.²⁰ detailed the major events in that suit. The SFNAACP plain-

12. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 37 n.4 (N.D. Cal. 1983).

13. No. C-72-0808-RFP (N.D. Cal. filed May 5, 1972).

14. See *San Francisco NAACP*, 576 F. Supp. at 37 n.4.

15. See KIRP, *supra* note 9, at 109 ("[T]he case was not pursued vigorously" by the NAACP).

16. One of the lawyers involved in the early stages of the SFNAACP case in the late 1970s has informed me that the case was initiated by the national level of the NAACP as part of its overall strategy to bring school desegregation cases outside of the deep South. Personal communication with Professor Mark Aaronson, Sept. 1999. See also KIRP, *supra* note 9, at 113 (describing how the national NAACP took over control of *Johnson* from the local NAACP when the national organization feared "a symbolic defeat in the first major Northern city to experience desegregation.").

17. See *San Francisco NAACP*, 576 F. Supp. at 36.

18. The defendants included the San Francisco Unified School District, the members of the school board, the district's superintendent of schools, the California State Board of Education and its members, the State Superintendent of Public Instruction and the State Department of Education. See *id.*

19. See *id.* The district court ultimately certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. See *id.* at n.2. For a discussion of the difficulties, ultimately leading to the *Ho* suit, that derived from this large, undifferentiated class, see *infra* note 106.

20. Judge Orrick (b. 1915) is a native San Franciscan. He was in private practice in San Francisco for many years in the firm once headed by his father and still bearing the family name (now Orrick, Herrington & Sutcliffe). He worked for Attorney General Robert Kennedy as head of the Civil Division of the Department of Justice. Part of his

tiffs alleged a wide-ranging series of practices and policies that they contended perpetuated a dual school system.²¹ The court noted the lengthy and extensive discovery, motion practice and trial preparation that the parties engaged in over a four-and-one-half-year period.²² The court highlighted three pre-trial motions as especially important in shaping the case for trial and precipitating the settlement of the case through a consent decree.

For present purposes, the third motion is the most important to consider.²³ The SFNAACP filed a motion and lengthy supporting memorandum of points and authorities for partial summary judgment on the issues of whether, as of 1954 and 1970, the SFUSD was racially segregated as a matter of law. The SFNAACP's memorandum, filed in June 1980, traced the history of *de jure* segregation in the school district from the 1850s when "colored" and "Chinese" schools were created. It identified a series of allegedly discriminatory decisions regarding school site selection, attendance zones and feeder patterns, assignment of staff and faculty, and the use of achievement tests and discipline.

The material failed to persuade the court to rule for the SFNAACP. The court rejected the plaintiffs' invitation to infer from these decisions that the defendants intended to segregate the SFUSD schools. In sum, the court denied the motion for partial summary judgment because it found that the SFNAACP plaintiffs "had failed to establish the core of their case—the existence of a dual system as of 1954"²⁴

In denying the plaintiffs' motion, the court set forth uncontested factual assertions that could serve as stipulated facts for purposes of trial. In addition, "in order to aid the parties in their preparation for trial and for possible settlement negotiations,"²⁵ as part of its June 1981 opinion re-

duties included working briefly in Montgomery, Alabama, to help avoid confrontations between the Freedom Riders and Martin Luther King, Jr., on the one hand, and local police commissioners and the Ku Klux Klan on the other. Judge Orrick also served as Deputy Under-Secretary of State for Administration and then as head of the Antitrust Division of the Department of Justice for Presidents Kennedy and Johnson. After Judge Orrick returned to private practice in San Francisco, President Nixon appointed him to the federal district court in 1974. He assumed senior status in 1985; now in his mid-80s, Judge Orrick still maintains a full court calendar. *See* 4 JUDICIAL PROFILES OF NORTHERN CALIFORNIA (1996) (reprinting material that originally appeared in the L.A. DAILY J., July 21, 1987).

21. The court noted, *inter alia*, the plaintiffs' allegations regarding construction of new schools; using portable classrooms in order to incorporate existing residential segregation; establishing feeder patterns, transfer policies and attendance zones designed to leave students in racially isolated schools; using discriminatory testing procedures, disciplinary policies, tracking within schools and classrooms; hiring and assigning faculty and administrative staff; and allocating financial resources in discriminatory ways. *See San Francisco NAACP*, 576 F. Supp. at 37.
22. *See id.*; *see also* *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 484 F. Supp. 657 (N.D. Cal. 1979) (denying state defendants' motion to dismiss).
23. The others led to the court deciding that the first order of business at trial, should there be one, would be the current conditions of segregation in the SFUSD as of the filing of the complaint in 1978. *See San Francisco NAACP*, 576 F. Supp. at 38.
24. *Id.* at 38. The court also noted that the SFNAACP had failed to assert "a sufficient number of undisputed facts to create an inference of segregative intent" *Id.*
25. *Id.* The court hastened to add that it did not intend these comments "to prejudice or to render a ruling on the merits on any of the issues set for trial." *Id.* at 39 n.5. This

jecting the motion for partial summary judgment, the court commented on the factual deficiencies in the SFNAACP's case. The court mentioned particularly problems with the evidence "concerning discrimination against minority groups other than Blacks,"²⁶ as well as areas in which the plaintiffs appeared likely to prevail at trial.²⁷

Judge Orrick later concluded that the resolution of the motion did prove to be key in leading to the settlement of the suit. The court's findings and comments led the parties to begin discussing a possible settlement. Private negotiations over several months led the parties to conclude that a comprehensive settlement might be possible, but that there were still some sticking points. The court suggested the appointment of a settlement team composed of leading experts on school desegregation and education policy.²⁸ Rather than facilitate discussion among the representatives of the parties, the settlement team of education experts worked independently and presented its proposal to the parties.²⁹ When the parties were unable to finish drafting the consent decree in early December 1982,³⁰ the court appointed Wilmer, Cutler & Pickering, a Washington, D.C. firm, to assist in drafting the final portions of the decree.³¹ The par-

case would have been a bench trial, so it is unclear how much aid and comfort this comment gave to the parties.

26. *Id.* at 39.

27. The court mentioned faculty and administrative hiring and placement as examples. *See id.*

28. *See id.* The court appointed an eight-person settlement team as expert witnesses under Federal Rule of Evidence 706. The court itself appointed "two of the best educators in the country" as the co-chairs. *Id.* One was Professor Harold Howe II from the Harvard University Graduate School of Education, and formerly United States Commissioner of Education under President Lyndon Johnson. The other was Professor Gary A. Orfield, then of the University of Chicago. *See id.* at 39, 64-65 (listing their qualifications). At least with Professor Orfield, however, the court did not select a completely detached expert. Orfield, now the director of the Harvard Project on School Desegregation, has been called "one of this country's most relentless supporters of school integration . . ." Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1717 & n.10 (1997) (listing some of Orfield's many publications on school desegregation); *see also* Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 207(1999) ("Orfield's understanding of *Brown* . . . is inconsistent with any plausible reading of the Court's decisions since 1954.").

The parties were permitted to appoint two experts each to the team. The SFNAACP selected Gordon Foster, then professor of education at the University of Miami, and Robert L. Green, dean of Urban Affairs Programs at Michigan State University. The SFUSD appointed Barbara Cohen, then administrative assistant to the superintendent of the San Francisco Board of Education, and Fred C. Leonard, then the associate superintendent for Instructional Support Services for the district. The State selected Ples A. Griffin, then the chief of the Office of Intergroup Relations for the California Department of Education, and Thomas M. Griffin, a former chief counsel and administrative advisor at the California Department of Education. All appointees had extensive, relevant experience; many had published in the field or served as a consultant or expert witness in school desegregation cases. *See San Francisco NAACP*, 576 F. Supp. at 39, 65-66 (listing full qualifications of the appointees).

29. *See San Francisco NAACP*, 576 F. Supp. at 39-40.

30. In the court's view, the problem was that the parties had come to share a common conception as to how the desegregation plan would function, but they could not reduce that conception to written form. *See id.* at 40.

31. *See id.* The court did not explain why it needed to reach across the country to find facilitators.

ties agreed to the terms of the decree, and submitted it to the court on December 30, 1982, just a few weeks ahead of the scheduled trial date.

The fifty-five paragraphs (not including numerous sub-paragraphs) of the proposed decree encompassed a wide range of contemplated relief.³² The areas included student desegregation, desegregation of faculty, administrators and other staff, staff development, extracurricular activities, school discipline, academic excellence, parent and student participation, housing desegregation, reporting and monitoring, the state's role in financing, and the retention of jurisdiction.³³

Despite the great amount of detail included in its terms, there are no findings specifying the defendants' acts of *de jure* segregation justifying the entry of any decree. Aside from a brief reference to the SFNAACP's initial allegations,³⁴ the only mention of any justification is contained in a one-sentence paragraph.³⁵ There is no statement explaining how the plaintiffs' evidence, which in June 1981 the court had found to be insufficient as a matter of law to establish *de jure* segregation, had been transformed into legally sufficient evidence by December 1982.

The most important part of the decree, ultimately leading to the *Ho* action, related to the plan for achieving student desegregation. The decree recognized nine racial or ethnic groups in the school district.³⁶ As the court put it, "[t]he key objective of the student desegregation plan is to eliminate racial/ethnic segregation or identifiability in any school, classroom, or program, and to achieve throughout the system, the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population."³⁷ To accomplish this objective, most "regular" (i.e., neighborhood) schools were to enroll students from no fewer than four of the recognized groups and to ensure that no more than 45% of their enrollments were composed of students from any one recognized racial or ethnic group. For a set list of fourteen "alternative" schools (schools serving the entire system rather than a particular

32. The original SFNAACP consent decree is set forth as an appendix to the court's opinion approving it. *See id.* at 51-64.

33. *See id.* at 40-42 (summary in court's opinion), 53-60 (terms of the decree), 63-64 (summary in notice to class).

34. *See id.* at 51-52 (noting that the complaint "alleges that Defendants have engaged in discriminatory practices and maintained a segregated school system" in San Francisco).

35. Paragraph 8 of the decree, in its entirety, provides: "The parties stipulate and agree that, if proof were presented in formal proceedings, the Court would be justified in making factual findings and legal conclusions sufficient to require the systemwide remedies that are set forth in this Consent Decree." *Id.* at 53.

36. These were: Spanish-surnamed (constituting 17.2% of the school population of the SFUSD in 1983); Other White (16.9%); Black (23.1%); Chinese (19.5%); Japanese (1.1%); Korean (1.0%); Filipino (8.7%); American Indian (0.6%); and Other Non-white (11.9%). *See id.* at 37. The court did not explain how these groups were selected, or which groups might have been consolidated into the "Other white" and "Other Non-white" categories. For example, it is not clear why "Japanese," "Korean," and "American Indian," who together constituted less than 3% of the student body, needed to be recognized as separate groups, while "Other Non-white" was left as one group over four times the size of these three groups combined.

37. *Id.* at 40, 53 ¶ 12 (exact language from consent decree).

geographic area) the decree imposed a stricter cap of 40% for any one ethnic group, as well as the minimum of four groups.³⁸

A few other provisions in the SFNAACP decree are important for understanding the *Ho* action. First is the state role in financing the costs of implementing the decree. The parties contemplated that the State of California would reimburse the SFUSD for the entire cost of complying with the court order.³⁹ Second, the parties agreed that after six years, the defendants could move to terminate the decree, if the defendants had substantially complied with the decree and the basic objectives had been accomplished. The decree did not include any mandatory termination or review date.⁴⁰ Third, the parties agreed that "the overall goal" of the consent decree required "continued and accelerated efforts to achieve academic excellence" throughout the district.⁴¹ Fourth, the decree provided

38. *See id.* at 40–41. In addition, 19 historically segregated schools were given special treatment, with specific designated caps for the dominant racial or ethnic group ranging from 37 to 44.9%. *See id.* at 41. The decree identified five schools said to have an excessive number of black students, nine schools with an excessive number of Spanish-surname students, and five schools with an excessive number of Chinese students. *See id.* at 54. The student desegregation portion of the decree also contained special plans to transform certain schools in the Bayview/Hunter's Point area, an historically black neighborhood in San Francisco that is somewhat geographically isolated in an otherwise fairly compact city. The expectation was that by making these schools into magnet schools, children from other parts of the city would choose to attend them. *See id.* at 41, 54–56.

39. *See id.* at 42. State reimbursement for compliance and monitoring costs would be made pursuant to Sections 42243.6 and/or 42249 of the California Education Code. *See id.* at 59. In 1985, however, the state legislature limited reimbursement of court-mandated desegregation costs to 80% of the expenditures in excess of the amount spent in the 1984–85 school year. Judge Orrick ordered reimbursement of 100% of the costs of desegregation, as provided by law at the time the consent decree was entered. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 695 F. Supp. 1033 (N.D. Cal. 1988). The Ninth Circuit reversed, holding that the decree did not obligate the state to reimburse all of San Francisco's desegregation expenses, regardless of changes in the underlying state law. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412 (9th Cir. 1990). Despite this reduction in the formula, the state has continued to provide between \$25,000,000 and \$45,000,000 per year. *See Uradnik, supra* note 4, at 71.

40. *See San Francisco NAACP*, 576 F. Supp. at 42, 60.

41. *Id.* at 58. The decree required that test scores and other data be collected and reported annually for each building and the district as a whole. The court later noted that the decree "relied on a close link between desegregation and educational improvement." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78-1445-WHO, 1993 WL 299365, at *1 (N.D. Cal. July 22, 1993). The court observed that the decree "charted new territory in devising both desegregation standards . . . and far-reaching education changes . . ." *Id.*

Some of these changes were far-reaching indeed. For example, teachers in certain schools had to agree to abide by a list of 11 tenets, designed to make sure they would work well with minority students. These included: "No. 1: 'All individuals should learn to live and work in a world that is characterized by interdependence and cultural diversity.' . . . No. 8: 'If individuals do not learn, then those assigned to be their teachers should accept responsibility for this failure and should take appropriate remedial action.'" Debra J. Saunders, *The Loyalty Oath*, *Circa 1995*, S.F. CHRON., June 21, 1995, at A21; *see also* Stuart Biegel, *San Francisco Unified School District Desegregation*, Paragraph 44 Independent Review, Report No. 15, 1997–1998, at 26–27 n.22, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed July 31, 1998)

that the state department of education would appoint a monitor to review implementation of the decree.⁴²

Evaluating the proposed settlement for procedural and substantive fairness, the court first took note of the procedures the parties had followed to notify the class of the proposed settlement and to hear from parties raising objections at the fairness hearing.⁴³ The court described the substantive standard as whether the settlement was "'fundamentally fair, adequate, and reasonable.'" ⁴⁴ The court observed that the general rule in school desegregation cases was that a remedial plan was fair and adequate "if it corrects the constitutional violations *found* and does so in a manner which does not infringe on the rights of others."⁴⁵ In this case, however, because the case had been compromised, "and before any constitutional violations have been proved,"⁴⁶ the court saw its task as determining the extent to which the decree would cure the violations alleged as well as whether a better result for the class could come from further litigation.⁴⁷

Judge Orrick relied on his long familiarity with the case in finding the settlement fair, reasonable, and adequate. The court found that the decree effectively addressed the primary concern underlying the *SFNAACP* suit, "alleged racial segregation of students in San Francisco's schools."⁴⁸ It imposed "mandatory limitations (as contrasted to the current voluntary guidelines) on the percentage of students"⁴⁹ from any one race or ethnicity who could attend each school in the SFUSD, thus assuring the "complete desegregation" of San Francisco's schools within a few years.⁵⁰ The court also noted that the decree would amend the policies and practices

(No. C-78-1445-WHO) (quoting the entire set of tenets "that all schools in the district must subscribe to whether they receive Consent Decree funds or not.").

42. See *San Francisco NAACP*, 576 F. Supp. at 59. This provision was of only limited success. The person selected to serve as monitor was not really independent because he worked for a defendant, rather than for the court directly. See Uradnik, *supra* note 4, at 79-81 (detailing complaints of the monitor that state education officials edited his reports before being submitted to the court). Gary Orfield later described the monitor as "powerless." See *id.* at 82 (quoting interview).

43. See *San Francisco NAACP*, 576 F. Supp. at 43.

44. *Id.* (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

45. *Id.* (citing *Mendoza v. United States*, 623 F.2d 1338, 1345 (9th Cir. 1980)). The court also recognized that a potential injustice could arise if the burdens and benefits of a class remedy become increasingly unequal and a small minority of class members were asked to bear an increasingly disproportionate share of the burden. See *id.* at 44 (citing *Mendoza*, 623 F.2d at 1344).

46. *Id.* at 43.

47. The court did not consider whether it had the authority under the Supreme Court's then-existing precedent to enter any remedial order in the absence of evidence of an actual violation of the Constitution. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 433-34 (1976) (interpreting *Swann* as limiting the scope of judicially created relief available to correct violations of the Equal Protection Clause of the Fourteenth Amendment).

48. *San Francisco NAACP*, 576 F. Supp. at 44.

49. *Id.*

50. *Id.*

alleged to have contributed to a racially segregated system, such as school siting and enrollment and transfer policies. The court praised the defendants for agreeing to undertake so many responsibilities, which addressed the concerns of the SFNAACP plaintiffs, "even though no constitutional violations on their part have been proved."⁵¹ The court commended the defendants for "their dedication to academic excellence and equal educational opportunity for all children in San Francisco."⁵²

The court went on to explain how the decree represented a reasonable compromise among the parties, given the risks of further litigation from the plaintiffs' point of view. The court detailed some of the problems the SFNAACP faced at trial.⁵³ For example, the court saw a "substantial risk" that the SFNAACP would have failed to establish the "crucial link" between historical incidents of segregation and the school district's policies and practices circa 1954, when *Brown* was decided.⁵⁴ The court detailed several ways in which the SFNAACP's proof of discrimination against black children was "weak in several respects."⁵⁵ Without "convincing proof of a dual school system," the SFNAACP would have had a significant burden proving the remainder of their case⁵⁶ because they would have had to prove current (or at least post-1954) "incidents of intentional segregation."⁵⁷

The court went on to explain how difficult that task would have been in light of the evidence adduced.⁵⁸ Further, the plaintiffs had produced or discovered "little" or "very little evidence" to prove the allegations that the state defendants had intentionally acted to create a dual system in San

51. *Id.* at 45.

52. *Id.*

53. This section of the opinion makes it appear that the task the SFNAACP faced at trial was extremely daunting, leading one to wonder why the state and local defendants agreed to settle the case. One possibility is that the defendants could foresee that they would reap some benefits of a political and financial nature if they settled and came under court order. Another possibility is that the court's opinion skewed the actual state of the record so as to sell the settlement to otherwise skeptical members of the plaintiff-class as the best they could obtain under the circumstances. Uradnik, *supra* note 4, at 66 n.104, reports that Aubrey McCutcheon, the attorney who has handled both SFNAACP and *Ho* for the SFUSD, told her that the settlement in SFNAACP "saved the district from a potentially embarrassing finding that it had intentionally discriminated."

54. *San Francisco NAACP*, 576 F. Supp. at 46.

55. *Id.* The court pointed to the plaintiffs' heavy reliance on a 1943 study "of dubious validity." *Id.* Without that study, the SFNAACP's assertion that feeder patterns and attendance zones were altered in order to maintain segregated schools was "entirely unsupported." *Id.* The plaintiffs had no contemporary evidence to document feeder patterns utilized from 1945 to 1961; instead, "by a questionable methodology," they had "reverse interpolated" such documentation from 1962 statistics. *Id.* Further, the SFNAACP had apparently not located any authoritative school boundary maps for the period prior to 1963. *Id.*

56. *Id.*

57. *Id.*

58. The court used language to the effect that defendants had "sufficiently cast doubt on the accuracy of plaintiffs' data," or that other proof was "often weak or unavailable." *Id.* at 46-47.

Francisco or had failed to act with knowledge that they were permitting a dual system to be maintained.⁵⁹

The court also noted that the plaintiffs had "produced little or no evidence of discrimination against any racial/ethnic group other than Blacks."⁶⁰ The court indicated that it might have had to create subclasses of students during the trial to develop a factual record with respect to these students. Some students (perhaps "Other Whites," although the court does not say), might have had to have been dismissed from the suit for want of a showing of any constitutional violation and would thereby be deprived of "enjoy[ing] the fruits of the Decree . . ."⁶¹ The plaintiffs' interests might have diverged during the remedial stage of the proceedings, and their competing for relief tailored to their specific interests might have generated "less than the whole of the comprehensive relief conferred upon all the class members" by the agreement.⁶²

Although the court itself had raised the possibility of competing interests among the class members,⁶³ the opinion rejected any suggestion that subclasses were necessary at this stage of the proceedings. Indeed, the court praised the plaintiffs' counsel for representing "the interests of all class members in an exemplary fashion."⁶⁴ This was an easier conclu-

59. *Id.* at 47. The court took pains to caution that nevertheless, "[a]ll of this is not to say that plaintiffs could not have won their case." *Id.* The evidence was reviewed in this manner only to show that the risks of further litigation were very real for the class of plaintiffs. *See id.*

60. *Id.*

61. *Id.*

62. *Id.* Elsewhere, the court emphasized that the plan was "designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group." *Id.* at 49.

63. For example, the court received "the greatest number of objections" from parents in the largely black Bayview/Hunter's Point area, who expressed concern that they would lose their local elementary and middle schools and that their children would be displaced out of the neighborhood. *Id.* at 48-49. Representatives from the Mexican American Legal Defense and Educational Fund argued that the needs of Hispanic students had not been addressed adequately and that they should be treated as a subclass or allowed to opt out of the plan. *See id.* at 49-50. Another speaker (ethnicity not noted in the court's opinion) questioned whether plaintiffs' counsel—primarily local and national NAACP lawyers—could adequately represent all of the racial and ethnic groups in the litigation. *See id.* at 50. All these pleas were rejected. *See id.* at 49-50.

Furthermore, the court's opinion nowhere made any mention of the Ninth Circuit's determination in the *Johnson* case that Chinese parents had to be allowed to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure in that earlier effort to achieve racial balancing in San Francisco's public schools. *See Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 352-54 (9th Cir. 1974). The court had cited *Johnson* earlier in its opinion. *See San Francisco NAACP*, 576 F. Supp. at 37 n.4.

64. *San Francisco NAACP*, 576 F. Supp. at 50. It appears that the court met its formal obligation to certify the class under the requirements of Rule 23 of the Federal Rules of Civil Procedure only nunc pro tunc as part of the process of approving the settlement, rather than soon after the suit commenced in 1978. *See id.* at 36 n.2. Rule 23(c) requires the court to certify the class "[a]s soon as practicable after the commencement of an action brought as a class action . . ." FED. R. CIV. P. 23(c). This may have been an additional incentive to ignore any concerns that the suit should have proceeded using subclasses with separate representation for each. Recognition of this fact at such a late date could have led to scuttling the detailed settlement, which the

sion to reach than it might have been because, in the court's view, "[a]ll of the class members sought as a common objective the complete desegregation of the District, and plaintiffs' counsel has served that common objective well."⁶⁵ The court did not explain how it had discerned the views on this subject of the 60,000 plus elementary and secondary school students in the district, let alone the views of their parents, or of any children and parents of children who might be eligible to attend SFUSD schools in the future. Rather, it seems that the court simply accepted the NAACP's projection of its institutional goal upon the class of San Francisco school children.⁶⁶ Having dealt with the objections, the court approved the proposed decree as "fair, reasonable, and adequate."⁶⁷

C. A Decade Under the Consent Decree

1. *The Committee of Experts' Report*

After eight years of operation of the consent decree, Judge Orrick decided to commission a comprehensive status report. The court again appointed Professor Gary Orfield as chair. Each party again was permitted to appoint two experts to the panel.⁶⁸ The Committee of Experts saw that the decree had two "primary objectives:" (1) the elimination of racial/ethnic segregation or identifiability in any school, program or classroom in the district and "to achieve the broadest practicable distribution" of students from the racial and ethnic groups in the system;⁶⁹ and (2) "to achieve academic excellence" throughout the district.⁷⁰

The Committee's July 1992 report noted the demographic changes in the district that had taken place since negotiations leading to the decree had begun in 1981. The Chinese American students had become the largest group in the city, while African American students, who had been the largest group when the decree was first implemented, had suffered the

court could well have been reluctant to do. See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1219 (1982) ("From a trial court's perspective, more is seldom merrier. Multiple representation multiplies problems, both administrative and substantive.").

65. *San Francisco NAACP*, 576 F. Supp. at 50.

66. Cf. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (detailing the occasional divergence between the aspirations of the NAACP's national strategy of integration and the desires of local clients for quality schools in their own communities).

67. *San Francisco NAACP*, 576 F. Supp. at 51.

68. See *Desegregation and Educational Change in San Francisco: Findings and Recommendation on Consent Decree Implementation*, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed July 1992) (No. C-78-1445-WHO) [hereinafter *Findings and Recommendation*]. Four of the seven members of the panel (Orfield, Green, Foster, and Cohen) had served previously on the settlement team, which had devised the decree in 1982. The new members were attorney (and now Federal Circuit Judge) David Tatel, a school district appointee, Paul Lawrence, the state monitor, and Fred Tempes. The qualifications of the panel members are listed in the document itself. The findings of the report are also summarized in Uradnik, *supra* note 4, at 72-79.

69. *Findings and Recommendation*, *supra* note 68, at 16 (quoting paragraph 12 of the decree). See *San Francisco NAACP*, 576 F. Supp. at 53.

70. *Findings and Recommendation*, *supra* note 68, at 16 (quoting paragraph 39 of the decree). See *San Francisco NAACP*, 576 F. Supp. at 58.

greatest loss on a percentage basis.⁷¹ The Committee asked itself whether the desegregation policies "adopted in a different era" were still optimal in the school district. It is perhaps not very surprising that a committee whose majority had devised the plan originally concluded that "the standards are sufficiently adaptable that they can continue to work."⁷² In fact, the Committee of Experts saw the changes as creating opportunities for effective desegregation.⁷³

In brief, the Committee concluded that the district had "largely achieved the Decree's desegregation goals."⁷⁴ The Committee, however, saw problems needing attention in student assignments at the school level.⁷⁵ The Committee was concerned that the decree had not led to more "contact between the most successful and least successful groups of students" in the district.⁷⁶

The Committee of Experts devoted most of the report to its conclusion that after nearly nine years of effort and the expenditure of approximately \$200 million, the district had not realized the goals for academic achievement for most African American and Hispanic students.⁷⁷ The Committee devoted much of its eighty-two-page report to documenting this problem and to making recommendations to address the issues; the Committee did not, however, tie the problem to specific policies of the district, whether from the period prior to the entry of the decree (i.e., when the district was alleged to have discriminated) or in the period subsequent to the entry of the decree.⁷⁸ While the Committee reported and deplored the disparity in achievement scores between white and Chinese American students on the one hand and African American and Hispanic students on the other, the Committee did not offer any data to indicate that the disparity was any worse than could be found in other urban school districts in the country.⁷⁹

71. See Findings and Recommendation, *supra* note 68, at 19. At the time of the report, Chinese American students were 24%, Latino students 19%, and African American students were 18.8% of the student population. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78-1445-WHO, 1993 WL 299365, at *1 (N.D. Cal. July 22, 1993). The Committee of Experts attributed these changes to high dropout rates for African American and Latino students, the extraordinary cost of housing in San Francisco, and the continuing in-migration of Asians. See Findings and Recommendation, *supra* note 68, at 20.

72. Findings and Recommendation, *supra* note 68, at 21.

73. Noting that residential segregation was not expanding, and some historically segregated areas were experiencing "significant growth of residential desegregation," the Committee thought it possible to continue to have "beneficial school desegregation while gradually reducing mandatory busing." *Id.* at 21-22. The Committee even thought it was possible to consider allowing modest transfers of suburban students into city magnet schools and vice versa. See *id.*

74. *Id.* at 1; see also *id.* at 22.

75. See, e.g., *id.* at 28-31.

76. *Id.* at 23. The Committee acknowledged that the decree did not prohibit the district from meeting desegregation goals by bringing together, for example, members of four disadvantaged minority groups. See *id.*

77. See *id.* at 1.

78. The Committee chose not to "assign blame" or "apportion responsibility" for the lack of improvement. *Id.* at 2.

79. This troubling disparity continues on a national basis to the present time. See, e.g., THE COLLEGE BOARD, REACHING THE TOP: A REPORT OF THE NATIONAL TASK FORCE ON

Many of the Committee's recommendations were designed to increase opportunities for African American and Hispanic students to attend quality schools.⁸⁰ The Committee of Experts called for an expansion of educationally successful reforms to other schools in the district, more faculty integration, and more integration of bilingual programs.⁸¹ The Committee asked the district to act to end the practice of parents falsely stating the race or ethnicity of their child in order to obtain a favorable placement.⁸² The Committee also recommended stronger independent monitoring of the district's compliance with the decree.⁸³

The Committee of Experts made no mention of when judicial supervision of the decree might come to an end. It made nothing of the parties' understanding in 1983 that after six years, the defendants might ask the court to consider whether "Defendants have substantially complied with the Decree and whether the basic objectives of the Decree have been achieved."⁸⁴ It did not consider whether the problems it saw could be tied to any previous illegal conduct of the defendants.⁸⁵ It did not delve deeply into whether the substantial sums the state had poured into the district

MINORITY HIGH ACHIEVEMENT (1999) (calling for new initiative to eliminate the academic gaps between African American, Latino and Native American students and their white and Asian American peers).

80. See Findings and Recommendation, *supra* note 68, at 6. At the Committee's recommendation, the racial/ethnic cap system was simplified and the 40% cap was extended to all alternative schools. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78-1445-WHO, 1993 WL 299365, at *1 (N.D. Cal. July 22, 1993).
81. See Findings and Recommendation, *supra* note 68, at 8. For brief summaries of the Committee's findings written by Committee members, see Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 782-83 (1993); David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 66-68 (1992-93).
82. See Findings and Recommendation, *supra* note 68, at 22-23; see also Uradnik, *supra* note 4, at 88-89 (describing manipulations such as African American students taking Hispanic surnames in order to stay in their neighborhood schools and children changing their ethnicity several times to get into the schools they wanted as they moved from elementary to middle to high school). The admissions and transfer form was later changed to inform parents that falsification of the racial information "will constitute perjury." The form was modified to permit one change of racial designation, but only with "rationale and documentation to support the change." *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 858 (9th Cir. 1998). There has never been a mixed race designation on the forms. See generally Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (considering "core dilemma" of race-conscious law: how to balance the importance of race-classification to anti-discrimination measures and the "fundamental indeterminacy" of the concept of race).
83. See Findings and Recommendation, *supra* note 68, at 75-78.
84. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 60 (N.D. Cal. 1983).
85. This is especially noteworthy when one considers that the court in 1983 had noted the paucity of evidence of discrimination against any ethnic group other than blacks. See *id.* at 47. The Committee seems to have assumed that, once having found that Hispanic children were scoring poorly on tests, the court was entitled to address their problems through the consent decree. The court seemed to acknowledge this when it noted later that the Committee "defines the focus of this litigation more broadly than do the NAACP and the State, as encompassing the academic achievement of minority students as well as the desegregation of the schools." *San Francisco NAACP*, 1993 WL 299365, at *4.

had been spent wisely.⁸⁶ The Committee did not address whether the state defendants continued to bear any responsibility for the conditions it found in the San Francisco schools.⁸⁷ Perhaps more naturally, the Committee of Experts made recommendations from the perspective of their expertise—what educators dedicated to the decree's goals of racial balancing and educational quality might wish to see rather than what the law might require or permit.⁸⁸

The court accepted the recommendations after a hearing in April 1993. It appointed a new advisory committee to serve as yet another monitor.⁸⁹ At the fairness hearing, the court also heard motions to inter-

86. Cf. *infra* note 88.

87. Cf. *San Francisco NAACP*, 576 F. Supp. at 47 (Plaintiffs had produced "very little evidence to support their theory of liability against the State defendants . . .").

88. As Uradnik points out, since a majority of the Committee of Experts had helped to devise the terms of the consent decree originally, they were hardly likely to declare implementation of the decree to have been a failure. See Uradnik, *supra* note 4, at 76–77. Instead, the Expert Report praised the "unique" decree and its "audacious" programs. See Findings and Recommendation, *supra* note 68, at 2, 4. The Committee also understood that if they were to recommend to the court that it terminate the decree, the SFUSD would lose considerable funding from the state. See *id.* at 3. The Committee did call for increasing the district's accountability in using the consent decree funds, in order to make sure that the money was targeted to helping minority students improve rather than simply serving as a funding source for the district. See *id.* at 4; see also Gary Orfield, *Toward an Integrated Future*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 331, 350 (Gary Orfield et al. eds., 1996) (praising the "radical educational reforms" produced in San Francisco after the court appointed a committee of experts headed by Orfield).

It is possible to get a glimpse of what a committee less wedded to the consent decree's ideals might have reported to the court in the early 1990s. Paul Lawrence, the monitor hired by the Department of Education, issued a far less sanguine report in September 1995. See *San Francisco District Desegregation Report No. 12*, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Sept. 15, 1995) (No. C-78-1445-WHO). Even though he had served as part of the Committee of Experts, Lawrence had become more and more concerned about the poor expenditure of consent decree funds. His 1995 report indicated, for example, that there had been almost no evaluation of the effectiveness of programs, that receiving agencies could not account for distribution of consent decree funds, that agencies charged for services not in accord with generally accepted accounting principles, that some SFUSD personnel were paid for services that were part of their regular assignments, and that administrative personnel were hired who had little to do with the decree. See *id.* at 2–3.

Uradnik, *supra* note 4, at 95–101, reviews other portions of Lawrence's report and includes confirming information from her interviews with Lawrence. Uradnik titled the chapter of her dissertation concerning the operation of the consent decree, "It Isn't About the Children Anymore," which is a quotation from what Lawrence told Judge Orrick about the decree. *Id.* at 62. She also discusses former Superintendent Ray Cortines's belief that the Department of Integration, which took charge of consent decree funds and was not really accountable to the superintendent, had created "a virtual 'spoils system' for adults, at the direct expense of the children of the district." *Id.* at 99.

89. See *San Francisco NAACP*, 1993 WL 299365, at *2. Judge Orrick again relied on Professor Orfield to chair the new advisory committee he appointed to strengthen monitoring and allowed the parties to nominate members. Once again, one could question the neutrality of the committee. See Uradnik, *supra* note 4, at 83–84 (calling the advisory committee "a condensed version of the litigants"). This committee was to work in secret and solve problems quietly. See *id.* at 84 n.157 (describing interview with Gary Orfield about the workings of the Advisory Committee).

vene from Multicultural Education, Training and Advocacy, Inc.,⁹⁰ Chinese for Affirmative Action,⁹¹ and the teachers' union. The court rejected all the motions to intervene, finding the NAACP "certainly capable" of representing the interests of all children in the district.⁹² The court did allow META and CAA to act as amici curiae and to each nominate a list of three possible representatives to the advisory committee, from which the court selected one from each group's list.⁹³ The court also recognized that at some time in the future the parties might be incapable of representing the interests of those represented by the amicus curiae groups. Therefore, the court denied the motions to intervene without prejudice,⁹⁴ and the parties settled in for what appeared to be a fairly long next phase of judicial supervision and school district implementation of the decree.

2. *Reaching the Breaking Point: Admissions at Lowell High School*

The Committee of Experts' report, while thorough in many respects, referred only obliquely to a demographic trend that would lead to the events triggering the *Ho* suit. The report did note that Chinese American students had grown to become the largest group of students in the school district since the court had approved the decree in 1983;⁹⁵ the Committee made little of the fact that at the secondary school level, their percentage

90. META appeared as counsel for organizations that included parents of Latino students, the Latin American Teachers' Association and ten named Latino students and parents. See *SFNAACP*, 1993 WL 299365, at *2.

91. Chinese for Affirmative Action, a San Francisco-based group, is "dedicated to affirmative action for Asian Americans in education and employment . . ." *Id.* at *5. CAA has consistently supported the goals and means embodied in the consent decree, including the race/ethnic limitations, but has sought to promote its view of the interests of low-income and immigrant Chinese. See, e.g., *Class Action: Chinese American Activists Come Out Swinging—But Divided—In the Battle Over the SF School Desegregation Plan*, THE BAY GUARDIAN, Apr. 17, 1993, at 23; see also *infra* text accompanying notes 382–383 (discussing CAA's opposition to the 1999 settlement).

92. *San Francisco NAACP*, 1993 WL 299365, at *7. The union's motion was rejected because it was untimely and because their interests were not within the subject matter of the litigation. See *id.*

93. See *id.* at *8–*10. The court believed that the advisory committee would be the key to the next phase, which would be focused on increasing the educational performance of historically disadvantaged children. See *id.* at *8. The court ultimately selected Laureen Chew, a professor at San Francisco State University, and J. David Ramirez, a professor at California State University Long Beach.

94. See *id.* at *9. The court's decision was affirmed. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 33 F3d 59 (9th Cir. 1994) (table), No. 93-16638, 1994 WL 447279, at *2 (9th Cir. Aug. 19, 1994) (text). In affirming, the Ninth Circuit majority and concurring opinions also noted that the language needs of students with limited English proficiency had to be addressed in the next phase of the decree's implementation. In contrast, Judge Orrick had seen that issue as governed by *Lau v. Nichols*, 414 U.S. 563 (1974), a wholly separate class action and consent decree being administered by another judge of his court. See *San Francisco NAACP*, 1993 WL 299365, at *5. Thus, the Ninth Circuit increased the consent decree's province over the school district without any concern for the need to connect the remedy back to constitutionally cognizable wrongdoing on the part of the school district.

95. In 1992, Chinese American students constituted 24% of the school district population. See *San Francisco NAACP*, 1993 WL 299365, at *1.

was even greater.⁹⁶ The Committee did not discuss the impact of these changes on competition to get into the more desirable schools in the district under the racial/ethnic cap system.

If the Committee of Experts did not find the impact worthy of comment, members of the Chinese American community in San Francisco certainly noticed. Parents and others affiliated with the Chinese American Democratic Club ("CADC") started pointing out the practical impact of the consent decree's racial/ethnic limits. Two figures stood out in their compilation of statistical data. First, by 1993, thirty schools in the district (approximately one third) were "capped out" for Chinese American students.⁹⁷ This meant that for many Chinese American parents, their children could not go to the school of their choice solely because of the racial and ethnic limitations imposed by the consent decree. Second, it was getting harder and harder for Chinese American students to get accepted at the high school of their choice. This problem was especially exacerbated at the one academically selective high school in the district, Lowell High School. Lowell is San Francisco's equivalent of the great academic public high schools in other cities such as Boston Latin School⁹⁸ or Stuyvesant High School in New York City.⁹⁹ By the spring of 1993, in order to stay within the court-ordered limitations, Chinese American students needed a considerably higher admission index score to get into Lowell than did any other racial or ethnic group.¹⁰⁰

96. The Committee did not break out the precise numbers for Chinese, but noted that African American and Hispanic students constituted a considerably smaller share of the upper grade enrollments due to high drop out rates. By 12th grade, African Americans constituted 12.5%, and Hispanics only 14.5%, of the class. See Findings and Recommendation, *supra* note 68, at 20.

97. THE CHINESE AMERICAN DEMOCRATIC CLUB, EQUITY AND EXCELLENCE 3 (1993). The Club's data also showed that 21 schools were capped out for Spanish-surnamed students and 14 schools were capped out for black students. See *id.* This meant that, for example, some children who needed bi-lingual education were kept out of certain schools with those programs because of the caps. Some African American children were bused out of their home neighborhoods, and away from newly improved consent decree schools, because of the caps. See Uradnik, *supra* note 4, at 107.

98. Courts have rejected two different race-conscious admissions policies for Boston Latin School in response to complaints modelled along the lines of *Ho*. See *Wessmann v. Gittens*, 160 F.3d 790, 793 (1st Cir. 1998) (rejecting "flexible racial/ethnic guidelines"); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (rejecting places set aside for black and Latino students); Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940 (1999) (discussing *Wessmann*).

99. Lowell points with pride at such alumni as former California Governor Edmund (Pat) Brown, Sr., Supreme Court Justice Stephen Breyer, naturalist Dian Fossey and Alexander Calder, the artist. See Elaine Woo, *Caught on the Wrong Side of the Line? Chinese Americans Must Outscore All Other Groups to Enter Elite Lowell High in San Francisco*, L.A. TIMES, July 13, 1995, at A1.

100. The Lowell Admission Index combines a student's grade point average in middle school with a score on a standardized test. A perfect admissions index is 69. In 1991, Chinese American students needed a 59 index to be admitted to Lowell; by 1993, the required index for Chinese American students had risen to 66. In contrast, the index score required of all other groups did not exceed 59; blacks and Spanish-surnamed students needed an index of 56 to gain admission in 1993. THE CHINESE AMERICAN DEMOCRATIC CLUB, *supra* note 97, at 4. These differences led Chinese American leaders to complain that the consent decree was really functioning as "affirmative action

In response to political agitation from Chinese American parents and the CADC, the then-new school superintendent, Bill Rojas, lowered the score for Chinese American students so that another 153 could be admitted for fall 1993.¹⁰¹ However, in order to maintain the court-ordered caps, and avoid incurring the wrath of the SFNAACP, Rojas had to agree to let in an equivalent number of students from other ethnic groups. This combined influx led to tremendous overcrowding and deep unhappiness at Lowell in the fall of 1993.¹⁰²

If the CADC had a somewhat sympathetic ear from the superintendent, they had little luck getting political support elsewhere in the spring and fall of 1993.¹⁰³ Their request to Judge Orrick to eliminate the racial cap on the city's high schools failed when the court approved the Committee of Experts' recommendation to maintain the racial/ethnic caps on all of the schools.¹⁰⁴ The Superintendent's Task Force, appointed to try to solve the problem of equity in admissions at Lowell, got nowhere in the fall of 1993, in no small part because some refused to discuss even the possibility of modifying the consent decree's racial/ethnic caps.¹⁰⁵ In fact, the SFNAACP's lawyer stopped participating in the Task Force, and reportedly left a meeting because of his position that the consent decree was immutable.¹⁰⁶ The CADC members realized that they had been stymied in

for whites" Joan Walsh, *Can This Man Fix Our Schools?*, S.F. Focus, Oct. 1993, at 135.

101. Rojas said he reasoned, "How can I tell a kid, 'You scored higher than these other kids, but I'm going to discriminate against you because you're Chinese?'" Walsh, *supra* note 100, at 135.

102. See Nanette Asimov, *Lowell High Fails Desegregation Test*, S.F. CHRON., Sept. 9, 1993, at A13.

103. See, e.g., Don Lau, *CADC Protests Consent Decree at School Board Meeting*, ASIANWEEK, Mar. 6, 1993, at 4 (describing protest where CADC members took off caps as a symbolic protest of their treatment under the decree); Warren Hinckle, *Liberals Go Back to the 60s*, S.F. INDEP., Feb. 23, 1993, at 1 (describing meeting of presidents of the Democratic political clubs in the city as "plantation politics" where they refused to support a resolution sponsored by the CADC and some black political clubs to ask the school board to "revisit" the decree); S.W. Chow, *Consent Decree Fails Chinese Americans*, ASIANWEEK, Apr. 9, 1993, at 6 (describing positions of other Chinese American leaders on discrimination under the consent decree as: "Ms. Fa [a Chinese American elected to the school board] says nothing. Mr. Der [the head of Chinese for Affirmative Action] says there is no problem, and Dr. Yee [another Chinese American on the school board] says that it is okay."). There may have been special disappointment in Dr. Yee, who had campaigned for election to the school board against unfairly keeping Chinese American students out of Lowell. See Don Lau, *S.F. School Board Reduces Lowell Admission Scores for Chi-Ams*, ASIANWEEK, Mar. 26, 1993, at 4. The CADC was able to reach out to some black and Hispanic leaders who favored emphasizing quality of education over forced busing. See Lau, *CADC Protests Consent Decree at School Board Meeting*, *supra*.

104. See Wei-Ling Hsu & Adoxia Huey, *Chinese-American Fight for Better Education Incites Conflict*, THE LOWELL, June 7, 1993, at 19.

105. See Minority Report, Lowell High Admissions Advisory Committee to the Superintendent of the San Francisco Unified School District 2 (Dec. 1, 1993) (unpublished manuscript, on file with the author) ("The majority of the . . . Committee by refusing to *even* discuss the Consent Decree, and rejecting race-blind merit admissions for non-affirmative action students to Lowell, give the appearance of officially condoning the SFUSD practice of discrimination . . .").

106. Personal communication with Professor Marsha Cohen, who at the time was a member of the Task Force.

the political process, had had no impact to date on the course of the *SFNAACP* suit, and that Judge Orrick had approved the expansion and continuation of the consent decree according to the recommendations of court-appointed experts, whom the CADC members had not helped to select and who did not reflect their views.¹⁰⁷ In response, in late 1993 or early 1994, the CADC members decided to seek their own legal representation and to see what else might be done to challenge the limitations imposed by the consent decree.¹⁰⁸

III. THE CHINESE AMERICAN CHALLENGE: *HO V. SFUSD*

A. The Search for Lawyers

The CADC looked for lawyers willing to represent parents who were upset at the effect of the decree's limitations. Members of the CADC's Consent Decree Task Force compiled a list of approximately thirty attorneys and public interest groups whom they thought might be willing to bring the suit on behalf of the aggrieved children and parents in the Chinese community. Not one of the people contacted working in San Francisco's public interest bar or large law firms was willing to take the case. For example, the local branch of the American Civil Liberties Union reportedly declined to represent the parents on the ground that the case was "too 'controversial.'"¹⁰⁹

It must be recalled that the lawyers for the *SFNAACP* had taken on the responsibility of representing all children in the district. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 50 (N.D. Cal. 1983). Thus, a lawyer whom the judge had praised as representing all interests "superbly" refused to discuss a vital matter with representative members of his own clients. This event undoubtedly helped to galvanize the CADC members into seeking their own representation. *See also Lynch, supra* note 5, at 6 (quoting Thomas I. Atkins, the NAACP's former general counsel and an attorney of record for the class of all children represented by the *SFNAACP*: "Every school must have no fewer than four of the nine major ethnic groups. Is that a quota—who cares? . . . For those parents who are hung up at not being able to get their kids into Lowell, tough s—t, that's my response."); Uradnik, *supra* note 4, at 87 ("The NAACP flatly refused to consider allowing the court to adjust the consent decree's original enrollment percentages."). My belief was that the proper thing for the *SFNAACP*'s lawyers to do would have been to go to Judge Orrick when this clear split arose and request separate representation for subclasses. *Cf. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* § 1765, at 266 (2d ed. 1986) (stating attorney for class has ongoing duty "to identify representation problems and report them to the court when they arise during the litigation.").

107. *See Uradnik, supra* note 4, at 92–94 (describing the frustrations of Amy Chang, who was very active in the CADC's efforts, and who felt that the Chinese American parents had been repeatedly ignored or "deliberately misled" by the superintendent and board of education, and who found Gary Orfield to be "incredibly hostile" and "very defensive" when approached with their concerns). In the interest of full disclosure, it should be noted that Chang took a course from me at Hastings after the *Ho* suit was filed.
108. *See Uradnik, supra* note 4, at 94 (quoting Chang on the grassroots origin of the suit: "parents whose kids were being turned away by a lot of schools.").
109. Declaration of Amy Chang in Support of Ho Plaintiffs' Application for Award of Attorneys' Fees and Reimbursement of Expenses Under 42 U.S.C. § 1983, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Apr. 13, 1999) (No. C-94-2418-WHO). The ACLU subsequently filed amicus curiae briefs in the district court and in the

The CADC did manage to find lawyers, but not from the obvious sources in San Francisco's extensive public interest bar. Shortly thereafter, through an acquaintance of Amy Chang, who was a key member of the CADC Task Force, Anthony K. Lee learned of and became interested in the effect of the consent decree on Chinese American students. Lee was then an associate in a San Francisco firm specializing in representing plaintiffs in financial and personal injury class action matters. He discussed the matter with Daniel C. Girard, then a partner in the firm, who also expressed interest.¹¹⁰ Girard and Lee had discussed previously the possibility of challenging anti-Asian quotas in effect in a number of educational institutions such as the University of California.¹¹¹ They concluded the situation in the San Francisco public schools reflected the downside of affirmative action policies that emphasized race and ethnicity to the exclusion of all else.

I came to the attention of the CADC Task Force through colleagues at Hastings College of the Law who had children attending Lowell High School at the time and who felt that the Chinese American students and parents were not being treated fairly in the process.¹¹² They asked if I would be willing to talk to a few people about their possible legal options. Expecting that I would just be attending one informational meeting, I agreed to let my colleagues forward my name.

Shortly thereafter, in February 1994, I was invited to a meeting to discuss the issues. The meeting was held in a quiet, private dining room in a restaurant deep in the heart of San Francisco's Chinatown. About a dozen other lawyers were present, including Girard and Lee, whom I had never met before. Amy Chang and the other CADC Task Force members present laid out the problem and asked for an expression of interest. Some of the

Ninth Circuit, which were intended to support the continuation of the consent decree. See Amicus Brief of American Civil Liberties Foundation of Northern California, Inc. in Support of Defendants/Appellees, *Ho v. San Francisco Unified Sch. Dist.* (9th Cir. filed Oct. 28, 1997) (No. C-94-2418-WHO); Motion for Leave to File Brief of Amicus Curiae, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Sept. 23, 1996) (No. C-94-2418-WHO).

110. Girard has said that his motivations included the desire to give members of groups not favored by typical affirmative action policies the same quality of representation the legal establishment was quite willing to provide to the more favored groups. In addition, he had reached the conclusion that a system of quotas would inevitably lead to injustices. He was also influenced by his father's witnessing and describing the existence of tacit quotas on Catholics and Jews in higher education in the early portion of his career as a professor. Personal communication.
111. For discussion of the relation of traditional affirmative action programs to Asian Americans, see for example DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1992); Robert Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 *HASTINGS CONST. L.Q.* 1115, 1126-27 (1996); Dana Y. Takagi, *From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy*, 37 *SOCIAL PROBS.* 578 (1990); Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 *YALE L.J.* 659 (1989).
112. My colleagues were aware that I taught (and teach) Remedies and Civil Procedure, and had a particular interest in remedies in public law. Among my work in these areas are DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC & PRIVATE* (2d ed. 1996); David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo and Freeman*, 20 *HASTINGS CONST. L.Q.* 579 (1993).

lawyers agreed to consider the matter and to check with their firms. At a second meeting, Girard, Lee, and I were the only lawyers still willing to consider the case.¹¹³ The others had been told by their firms that they were conflicted out from suing one or another of the potential defendants or could not take the case for other reasons, such as the unpopularity of taking on the Democratic establishment or the local NAACP. Girard agreed on behalf of his firm to take the case, and asked me to assist in my areas of expertise.¹¹⁴

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113. Contrary to the suspicions of some, we were not secretly contacted, hired, or funded by any anti-affirmative action or right-wing political groups to generate or litigate the *Ho* action. For an example of such suspicion, see YAMAMOTO, *supra* note 4, at 143 ("Was the Lowell High School suit about 'preferred' African Americans and Latinas/os displacing the 'better-qualified' children of Chinese immigrants and whites, or, conversely, about Asian Americans oppressing African Americans and Latinas/os by carrying out neoconservative whites' designs to dismantle all affirmative action?"); cf. Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79, 81 (1993) (warning Asian Americans of danger of being manipulated into opposing affirmative action); Wu, *supra* note 3, at 226 (charging that the "linkage of Asian Americans and affirmative action . . . is an intentional maneuver by conservative politicians to provide a response to charges of racism.").

It is certainly true, however, that some conservative politicians have found it useful to point to the *Ho* case to buttress their argument that affirmative action has gone awry. See, e.g., *Quotas in San Francisco: Hearings on Affirmative Action Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997) (hearings chaired by Senator Orrin Hatch); Ward Connerly, *Race Has No Place in School Admission Policy*, S.F. CHRON., Oct. 26, 1999, at A21; K.L. Billingsley, *Quota Foes Attack Judge's Decision on Racial Admissions*, WASH. TIMES, May 15, 1997, at A10; see also TAKAGI, *supra* note 111, at 139 ("Neoconservatives succeeded not only in reinterpreting the debate over affirmative action but in redefining the debate over Asian admissions. Whereas Asian American organizations . . . accused university officials of discrimination against Asians in order to protect whites, neoconservatives charged university officials with discrimination against Asians in order to protect blacks."); Chang, *supra* note 111, at 1128 (pointing out that conservatives tell Asian Americans that affirmative action hurts them); Omi & Takagi, *supra* note 3, at 273 ("The historical experience of Asian Americans becomes a particularly convenient narrative to exploit [by the Right]."); Yamamoto, *supra* note 4, at 894 (listing other politicians linking Asian Americans to their arguments against affirmative action). The supporters of the *Ho* suit have not climbed on that bandwagon. See, e.g., Liu, *supra* note 3, at 351 (quoting a leader of the Chinese American Democratic Club: "[M]any groups have tried to piggyback on our case and interpret it to fit their agendas. . . . [T]his case is about ending discrimination and not at all about ending affirmative action.").

114. Girard and Lee are litigators with extensive experience in class action matters. (Reflecting their practice, their firm's Web page is located at <www.classcounsel.com>.) They had the resources of a law firm behind them, but did not have special expertise in civil rights or school desegregation cases. I had some litigation experience prior to joining the Hastings faculty, had clerked for a federal judge, and had a strong background as an academic specializing in the relevant substantive and procedural areas.

In addition to the obvious unfairness of quotas lacking the requisite legal and factual predicate, I was moved to help by the difficulties that the parents had experienced in obtaining representation. I was particularly incensed at the idea that a lawyer representing a class had refused to discuss matters with a representative group of his own clients. Further, as a tenured professor, I was not concerned about the potential controversy in taking a politically unpopular position in liberal San Francisco. The situation of the Chinese American families was a wrong I could not ignore.

For Girard and Lee, however, the consequences of taking an unpopular case were real. Not long after initiating the *Ho* case, Girard left his lucrative partnership and formed his own firm. A major reason he left his firm was because of the opposi-

B. The Course of Litigation in *Ho*

1. *The Initial Stages*

At a series of informational meetings, Chinese Americans expressed their feelings of frustration and disillusionment at seeing their children excluded from schools because there were "too many Chinese" according to the consent decree's quotas; some parents were moved to tears in describing their experiences. Three parents were willing to let their children serve as the named plaintiffs to illustrate the problems the consent decree caused Chinese American children. All three sets of parents and children are U.S. citizens and longtime residents of San Francisco.

Brian Ho was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood schools when he applied to kindergarten because the schools were capped out for children of Chinese descent. He was assigned to a school in another neighborhood.¹¹⁵

Patrick Wong, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. His score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because Chinese Americans were capped out at both. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were filled even though spaces for applicants of other racial or ethnic groups were still available.¹¹⁶

The family of Hilary Chen, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because Chinese Americans were capped out at all three schools. She had to continue to attend her old school, located several miles from her new home.¹¹⁷

The lawyers then had to decide how to structure the suit. One possibility would have been to seek intervention in the *SFNAACP* suit. This course seemed unwise because Judge Orrick had so recently denied intervention to another group seeking to represent the interests of Chinese American children.¹¹⁸ The court had recognized that the day could come when it might allow intervention; nevertheless, it seemed more than pos-

tion of his partners to his taking on the *Ho* case. One senior partner told Girard, "[w]e have ways of doing things here in San Francisco." Lee later joined him when the firm, Girard & Green, was well enough established to hire him. Personal communications.

115. See Class Action Complaint for Declaratory and Injunctive Relief for Violations of 42 U.S.C. § 1983, at 12, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed July 11, 1994) (No. C-94-2418-WHO) [hereinafter Class Action Complaint].

116. See *id.* at 13-14. After appealing the rejection, Patrick eventually got into one of his fallback choices. His first choice was Lowell.

117. See *id.* at 14-15.

118. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78-1445-WHO, 1993 WL 299365 (N.D. Cal. July 22, 1993), *aff'd*, 33 F.3d 59, 1994 WL 447279 (9th Cir. 1994). The Ninth Circuit affirmed the district court's decision denying intervention just one month before the *Ho* complaint was filed.

sible that the court would simply deny a motion to intervene on the grounds it had used previously. Moreover, the court had arguably limited the right to intervene in the future to the parties it had allowed to serve as amici curiae.¹¹⁹

Another course of action seemed much more fruitful. The suit could be structured as a collateral attack under *Martin v. Wilks*.¹²⁰ In *Martin*, a group of white firefighters brought an action alleging that the city of Birmingham, Alabama had violated their rights by giving racially based preferences in promotions to African Americans. The defense was that the race-conscious policy was required under a consent decree entered in a previous case with African American plaintiffs who had alleged that they had been the victims of racial discrimination. The district court allowed the city to interpose the consent decree as a shield against the charges of reverse discrimination. The Supreme Court, by a 5-4 vote, held that such collateral attacks were permissible unless the parties had been joined in the original action under Rule 19 of the Federal Rules of Civil Procedure. The dissent argued that the third parties' ability to intervene in the original suit under Rule 24 of the Federal Rules sufficiently protected their rights to due process.¹²¹

Following *Martin*, the *Ho* complaint alleged that the stated justification for turning down the applications of the Chinese American students was the consent decree entered in *SFNAACP*.¹²² The *Ho* plaintiffs alleged, however, that they had not been adequately represented by any of the parties entering into the consent decree and, hence, were not bound by it.¹²³ The plaintiffs sought class certification for a class consisting of all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to attend public schools of the school

119. Cf. *id.* at *9 ("[T]he motions to intervene as to the parties now made part of amici groups are denied without prejudice and may be brought again if the need arises.").

120. 490 U.S. 755 (1989).

121. Congress partially reversed *Martin* in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 108. The congressional modification applies to employment discrimination cases only, leaving *Martin* the law governing decrees in other fields. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

122. The *Ho* plaintiffs named as defendants all of the defendants in the *SFNAACP* suit, including the SFUSD, members of its board, the local superintendent of schools, the state board of education, the department of education and the acting state superintendent of public instruction. See Class Action Complaint, *supra* note 115, at 3-5. The *Ho* complaint did not name the *SFNAACP* as a party because it had not engaged in the actual classification and denial of admission of any students. The *SFNAACP* was soon added as a necessary party under Rule 19(a) at the request of the state and local defendants. See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 857 (9th Cir. 1998).

The *SFNAACP*'s early presence as a party meant that there did not exist the concern some have raised that it is not fair to the proponents of a consent decree to have it defended from collateral attack only by the alleged violators. See Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 314 n.254 (1999) (citing articles "arguing that intervention is particularly appropriate in public law cases.").

123. See Class Action Complaint, *supra* note 115, at 15-16.

district.¹²⁴ The equitable relief¹²⁵ requested in the complaint included a declaratory judgment that the system of racial classification and quotas was invalid under the Fourteenth Amendment and an injunction that would stop the defendants from operating the illegal system.¹²⁶

The clerk of the court assigned the case, as expected, to Judge Orrick under the court's local rule governing related cases.¹²⁷ Thus, the difference between filing a new suit making a collateral attack and a motion for intervention was not very great. The major difference from our point of view was that we were in a better procedural posture to withstand an initial attack from the defendants. It seemed more advantageous to fight at the trial and appellate levels on the favorable grounds of *Martin* and Rule 12(b)(6), rather than the more uncertain grounds of Rule 24. This strategy proved to be successful. The district court denied the defendants' motion to dismiss on grounds of res judicata and collateral estoppel. The court rejected the contention that all issues had been decided in 1983 because the *Ho* plaintiffs relied on events that had occurred after that date.¹²⁸ The court subsequently certified the class in March 1996.¹²⁹

124. See *id.* at 6.

125. The complaint did not seek legal relief because the activity complained of was sanctioned by the court through entry of the consent decree. Under these circumstances, a cause of action for damages did not seem worth pursuing. Cf. *Hopwood v. Texas*, 78 F.3d 932, 955-59 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (permitting claims for compensatory and punitive damages, as well as injunctive relief, for applicants allegedly denied admission to law school because of race-based admissions criteria); Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in Hopwood v. Texas*, 71 TEMPLE L. REV. 839 (1998).

126. See Class Action Complaint, *supra* note 115, at 17-18. A question arose later as to whether, under this complaint and the customary request for such other and further relief the court deems just and proper, the plaintiffs could attack other portions of the decree, and seek its termination at trial. See *infra* notes 238-242 and accompanying text for a discussion of this question.

127. See N.D. CAL. R. 3-12. Having to appear before the judge who had approved and supervised the consent decree in order to contend that the decree itself was unconstitutional left the *Ho* plaintiffs in something of the position of the child who called out that the emperor was wearing no clothes.

128. See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 857 (9th Cir. 1998). These preliminary rulings took a long time to obtain. The complaint was filed in July 1994; the motion to dismiss the complaint, the first responsive pleading filed by the defendants, was not denied until September 1995. The plaintiffs' application for class certification was filed November 2, 1995; the court did not issue its ruling certifying the class until March 1996. The summary judgment motion was filed on July 23, 1996, but the district court did not issue its opinion until May 1997. Not until the first trial date approached in the summer of 1998 did the court regularly rule much more promptly.

129. See *id.* At the class certification hearing, the SFNAACP took the position that the *Ho* plaintiffs could not represent the class of Chinese American students because their views were split. The primary evidence for this was an affidavit from Henry Der, the director of Chinese for Affirmative Action, who had long opposed the goals of the *Ho* plaintiffs and their supporters in the Chinese American Democratic Club. See Declaration of Peter Graham Cohn in Opposition to Plaintiffs' Motion for Class Certification Pursuant to F.R.C.P. Rule 23, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Dec. 11, 1995) (No. C-94-2418-WHO) (attaching copy of memorandum concerning consent decree prepared by Henry Der of Chinese for Affirmative Action). The SFNAACP, however, also attempted to argue that while the Chinese American community in San Francisco was so split on the issue the *Ho* plaintiffs

2. *The Motion for Summary Judgment*

a. The District Court Opinion

The most important motion in the case proved to be the *Ho* plaintiffs' motion for summary judgment. Although the SFNAACP had tried and failed to obtain summary judgment in its case, from our perspective, the premises of our motion were reasonably straightforward and clear applications of the law.

The *Ho* plaintiffs contended that there was no real question that members of the plaintiff class had been classified by race under the decree and that some plaintiffs, such as the named plaintiffs, had been refused admission or transfers to schools on the basis of their race or ethnicity. The plaintiffs also felt that this was unquestionably done under color of state law, because the school district required the racial and ethnic classification and had made decisions on that basis. The plaintiffs believed that these undisputed facts alone made out their *prima facie* case.

The plaintiffs contended that the defendants could not justify this race-based classification scheme under the Supreme Court's precedent requiring strict scrutiny. First, the plan was not supported by a compelling governmental interest. There had been no judicial findings of *de jure* segregation in *SFNAACP*.¹³⁰ The parties could not have concluded that there was a "strong basis in evidence,"¹³¹ which is the permissible alternative, when the court had gone to such great lengths in 1983 to demonstrate just how "weak" was the SFNAACP's evidence on this score.¹³² Moreover, the brief recitation in the consent decree that the court would have been justified in making factual findings to support the systemwide remedy was insufficient to justify the decree.¹³³

could not represent that group, the SFNAACP could continue to represent *all* school children in the city, including children of Chinese descent. See *SFNAACP Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification Pursuant to F.R.C.P. Rule 23*, at 7, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Dec. 11, 1995) (No. C-94-2418-WHO).

It was particularly ironic to see the SFNAACP lawyers oppose certification on the basis of Mr. Der's assertions because in *Vaughns v. Board of Educ.*, 574 F. Supp. 1280 (D. Md. 1983), *aff'd in part, rev'd in part on other grounds*, 758 F.2d 983 (4th Cir. 1985), one of the very same lawyers had fought off a similar challenge when the NAACP sought class certification in that school desegregation action. There, the court ruled for the NAACP position, saying, "[t]he fact that some members of the class may be personally satisfied with the existing system and may prefer to leave the violation of their rights unremedied is simply not dispositive of a determination under Rule 23(a)." *Id.* at 1286.

130. Indeed, the court had found that the SFNAACP had "failed to establish the core of their case." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 38 (N.D. Cal. 1983).

131. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

132. See *San Francisco NAACP*, 576 F. Supp. at 46-47.

133. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (stating that a "generalized assertion" of past discrimination does not meet the burden of justification for a government-imposed racial quota). See generally Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279 (1997) (ex-

The *Ho* plaintiffs also contended that the consent decree's plan failed under the second prong of strict scrutiny analysis—the obligation to demonstrate that the plan is narrowly tailored to further compelling governmental interests.¹³⁴ The plaintiffs contended that a plan the court had adopted and praised because it provides “relief for *all* San Francisco school children,” and “does not address the needs of any particular racial or ethnic group”¹³⁵ could not simultaneously be narrowly tailored to redress governmental wrongdoing intentionally directed at any particular group.

Finally, the plaintiffs contended that, even if there had been some *de jure* segregation present in 1983, its vestiges had been eliminated to the extent practicable by 1993.¹³⁶ The court's Committee of Experts had concluded in 1992 that desegregation had largely been achieved, and the court had adopted and approved that finding in 1993.¹³⁷ The undefined goal of “educational excellence” was no justification for maintaining the decree unless it was tailored to remedy injuries suffered by the victims of prior *de jure* segregation.¹³⁸ With these legal contentions, the plaintiffs felt that a motion for summary judgment was justifiable.¹³⁹

The defendants countered with a number of arguments. First, the school district denied that it was classifying students by race or ethnicity.¹⁴⁰ Second, the defendants contended that the *Ho* plaintiffs had the burden of demonstrating that the consent decree was no longer necessary to eliminate the vestiges of segregation.¹⁴¹ Third, if the defendants had the burden of justification, the decree should be reviewed under a standard lower than strict scrutiny.¹⁴² Fourth, more work remained to be done to

amining the level of proof the Supreme Court requires to prove discrimination in various contexts).

134. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (detailing the narrow tailoring requirement); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (same).

135. *San Francisco NAACP*, 576 F. Supp. at 49.

136. Cf. *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992).

137. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, No. C-78-1445-WHO, 1993 WL 299365 (N.D. Cal. July 22, 1993).

138. Cf. *Missouri v. Jenkins*, 515 U.S. 70, 100–02 (1995). By 1997, when the district court decided the motion for summary judgment, there were no victims of pre-1983 *de jure* segregation (if there were any in the first place) still in the SFUSD's K-12 school system.

139. See Shin, *supra* note 4, at 204 (writing before the motion for summary judgment was decided by the district court and concluding, “[i]n light of the [Supreme] Court's current attitude toward desegregation decrees and the racial quota systems, the *Ho* plaintiffs should have no difficulty prevailing on their Fourteenth Amendment claim.”).

140. See *Ho*, 147 F.3d at 857–59 (detailing affidavits from the SFUSD superintendent of schools, the program director of the Educational Placement Center of the district, the president of the school board, and the chief counsel for the district, all denying that the district either classified students by race or operated a quota system).

141. The defendants contended that the plaintiffs had to take on the same burden that a school board would have if it wanted to be released from a consent decree under *Freeman v. Pitts*, 503 U.S. 467 (1992).

142. The defendants contended that *Adarand* did not apply to a school desegregation case. Their main authority for this proposition was *Stanley v. Darlington*, 915 F. Supp. 764, 775 (D.S.C. 1996), which had accepted the argument that the level of scrutiny to be applied to race-conscious student enrollment plans was still an open question. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1323 (N.D. Cal. 1997). The

eliminate vestiges of segregation, especially in the area of educational excellence.¹⁴³

The district court denied the motion for summary judgment. The court recognized that it had never actually determined that the consent decree's race-based remedy was constitutional under strict scrutiny review.¹⁴⁴ The court attempted to show, nevertheless, that the decree was not unconstitutional under the standards that applied at the time it had entered the decree.¹⁴⁵ Even if there had been a problem, the court held that the *Ho* plaintiffs would be barred from raising the issue now. The issue would be barred by res judicata because the *Ho* plaintiffs were adequately represented at the time the decree was entered.¹⁴⁶

The court then turned to the more difficult question of the constitutionality of the decree at present.¹⁴⁷ The court agreed that the plaintiffs had shown that they were subject to race-based classification by a state

state defendants also contended that the decree could be defended under state law and the California Constitution. The court reminded the state defendants that the Supremacy Clause applied. *Id.* at 1323 n.6.

143. This contention was based on the recommendation of the Experts' Report.

144. The court acknowledged that it had focused in 1983 on how the decree addressed the constitutional violations alleged, rather than violations found to exist. *See Ho*, 965 F. Supp. at 1320; *cf.*, *e.g.*, *United States v. City of San Francisco*, 696 F. Supp. 1287, 1300 (N.D. Cal. 1988) (recognizing that in approving a consent decree containing a race-conscious remedy, the district court must find that the settlement satisfies both Rule 23 and the constitutional standards), *aff'd as modified*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990).

145. *See Ho*, 965 F. Supp. at 1320. The plaintiffs never made such a challenge in its motion for summary judgment. On appeal, plaintiffs referred to this portion as an advisory opinion. *See* Brief for Plaintiffs-Appellants at 16, *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998) (No. 97-15926).

146. Here, the court simply quoted its previous finding that the SFNAACP counsel had represented the interests of all class members in an exemplary fashion since all class members had a common objective in the complete desegregation of the district. *See Ho*, 965 F. Supp. at 1321 (quoting *San Francisco NAACP*, 576 F. Supp. at 50). The court did not explain how this earlier finding of adequate class representation was still valid in the face of a challenge to the remedy ordered to implement that objective and under precedent allowing collateral attacks on inadequate representation. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755 (1989); *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also* CHARLES ALAN WRIGHT ET AL., 7A FEDERAL PRACTICE AND PROCEDURE § 1765 at 294 (2d ed. 1986) (adequacy can be examined even after termination of the suit).

147. The court noted that the admissions policies at Lowell had been changed in 1996 to ameliorate the problem of turning away Chinese American applicants. The school changed to a system of using one qualifying index score for all races, with 20% of the places set aside for freshmen with lower index scores but who also possessed one or more of a set of so-called "value added" socioeconomic factors. *Ho*, 965 F. Supp. at 1319 n.2. The court did not note that the higher qualifying index score was set so that the number of Chinese American students admitted overall would not significantly exceed the 40% quota permitted under the consent decree. Nor did the court note that in order to keep up the number of Hispanics and African Americans at Lowell, all such applicants who possessed the lower index score were admitted without regard to whether they had any of the "value-added" characteristics. *See* Declaration of Marsha N. Cohen, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Dec. 10, 1999) (No. C-94-2418-WHO). Professor Cohen, a colleague at Hastings and a two-time Lowell parent, chaired the Lowell admissions committee for several years; she was instrumental in devising the revised system. *See id.* *See generally* Elaine Woo, *Racial Policy for Admissions to S.F. School Altered*, L.A. TIMES, Feb. 29, 1996, at A3.

actor.¹⁴⁸ The court also agreed that race-based classification shifts the burden of proof to defendants to provide a justification for the scheme. However, the court believed that the burden shift would occur at trial and did not relieve plaintiffs of demonstrating the absence of disputes of material fact on key issues at the summary judgment stage.¹⁴⁹ For purposes of the motion, the court assumed that strict scrutiny review applied. This meant that plaintiffs had to show an absence of a dispute of material fact and entitlement to judgment as a matter of law on just one element of the analysis.¹⁵⁰

Turning first to compelling state interest, the court noted that it was not required to have judicial findings of wrongdoing to justify the racial classification.¹⁵¹ Rather, all the trial court had to do was make sure that the state actor had a strong basis in the evidence. Despite the court's prior characterization of the evidence as "weak,"¹⁵² the district court reasoned that "this did not mean, as a matter of law, that there was insufficient evidence to support a finding of past discrimination."¹⁵³ Whether there was sufficient evidence, the court said, was a question of fact to be determined at trial. However, the court found that the plaintiffs had not met their burden of showing the absence of a dispute of material fact on the issue of past discrimination. The court did not explain, however, exactly which issues of material fact might be in dispute.¹⁵⁴

148. See *Ho*, 965 F. Supp. at 1322. The court rejected defendants' claims that students engaged in self-identification and that the district did not engage in classification by race.

149. See *id.* at 1322–23. The court cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), for this proposition. It did not discuss the impact of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the companion case to *Celotex*, even though the court had cited them together earlier in the opinion. See *Ho*, 965 F. Supp. at 1319. *Anderson* held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." 477 U.S. at 254.

150. See *Ho*, 965 F. Supp. at 1323.

151. See *id.* at 1323–24. The court incorrectly stated that plaintiffs' position was that this was the only possible justification for the racial classification. Plaintiffs had merely pointed out that this source of justification was not open to the defendants here due to the course of the *SFNAACP* suit, which had ended in a settlement without any findings.

152. See *San Francisco NAACP*, 576 F. Supp. at 46–47.

153. *Ho*, 965 F. Supp. at 1324. The court pointed to the parties' recitation that sufficient evidence existed. See *id.* at 1324 n.8. The district court did not explain how this unsupported conclusion was a better basis for supporting the race-conscious assignment plan than were the conclusory statements regarding past discrimination that the Supreme Court rejected in *Croson*, 488 U.S. at 500–01. Cf. *Ho*, 147 F.3d at 859–60, where the Ninth Circuit noted that "the court made no findings as to disputed facts involving current segregation or involving vestiges of past discrimination."

154. The court pointed to evidence of segregation that the defendants had adduced from the findings of courts from 1971 to 1981. See *Ho*, 965 F. Supp. at 1324 n.9. The court did not explain what was factually in dispute about that evidence, necessitating a bench trial. To the *Ho* plaintiffs, this merely seemed to be evidence that was not in dispute factually, but was legally insufficient to prove the existence of *de jure* segregation prior to 1983.

In my view, it would have been appropriate for Judge Orrick to try to explain how evidence the Ninth Circuit had found legally insufficient in 1974, and the judge himself had found inadequate for summary judgment in 1981, and "weak" and "dubious" in 1983, was simultaneously "a strong basis in evidence" justifying the decree.

Turning to the narrowly tailored prong of strict scrutiny analysis, the court again said that the plaintiffs had failed to demonstrate the absence of evidence supporting the defendants' case. The court moved on to consider and reject the plaintiffs' legal arguments.¹⁵⁵ The court did not address the main point that a decree whose purpose was to benefit all school children could not be narrowly tailored as a matter of law.¹⁵⁶

The court then considered the plaintiffs' third major point, that fourteen years of compliance with the decree was adequate. The court noted that it had a duty under *Dowell*, *Freeman*, and *Jenkins* to look for traces of *de jure* segregation.¹⁵⁷ In the court's view, the *Ho* plaintiffs had not demonstrated the absence of a genuine dispute of material fact on the issue of termination.¹⁵⁸ The court believed that the plaintiffs' evidence tended to show a failure of compliance in certain respects.¹⁵⁹ Further, the plaintiffs

However, there was no need to engage in additional fact-finding before making that determination. Cf., e.g., *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1179 (W.D. Okla. 1991) (refusing to re-open the evidentiary record before ruling on an equivalent issue after remand from Supreme Court); *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978) ("where . . . the evidentiary facts are not disputed, a court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions"). The district court's refusal to face this issue at summary judgment probably extended the life of the litigation two years longer than necessary.

155. See *Ho*, 965 F. Supp. at 1325. For example, the court distinguished *Croson* by reading it as simply finding that on the facts of that case a 30% quota could not be narrowly tailored. As to the plaintiffs' complaints that the decree went far beyond addressing school desegregation, the court's view was that it could not be said as a matter of law that the obligations—such as activism for housing development, achievement of academic excellence and influencing the transfer of students between districts—went beyond remedying past discrimination. See *id.* Again, the court did not identify what facts were in dispute; it merely asserted that such matters existed. See *id.* at 1325 nn.11 & 14 (asserting for example the "fact" that a number of schools were out of compliance with the caps). The plaintiffs did not dispute the existence of such facts; their legal significance was hotly disputed.
156. Cf. *Ho*, 147 F.3d at 860 (noting that the district court did not respond to the argument that the decree utilized an unconstitutional racial balancing scheme).
157. See *Ho*, 965 F. Supp. at 1326.
158. Other matters that the court said distinguished the "factual posture" of the *Ho* case was that it involved a consent decree rather than a court desegregation order and the party seeking termination was a subclass of students and not the school district. *Id.* at 1326 n.13. The court did not explain why these differences mattered to its resolution of the motion for summary judgment.
159. For example, the State Monitor's 1995 Report, which the *Ho* plaintiffs submitted in support of their motion, showed that: (a) some schools were out of compliance with the quotas (the court did not say by how much); (b) African Americans were disproportionately placed in special education classes; (c) until recently, African American students had been placed in bi-lingual classes for disciplinary reasons; (d) the district had been slow to hire minority teachers; and (e) African American and Latino students performed the worst of any group on standardized achievement tests. See *id.* at 1326 n.14. The court did not explain how these matters were factually in dispute in a conventional sense. The plaintiffs' point was that, because no findings or statements of specific wrongdoing had been established in *SFNAACP*, the defendants could not tie the matters identified in the monitor's report to any vestige of *de jure* segregation still lingering from 1983, as required under *Freeman*. Cf. *United States v. City of Yonkers*, 181 F.3d 301, *vacated and remanded on rehearing*, 197 F.3d 41 (2d Cir. 1999) (imposing burden to demonstrate that a condition complained of was a vestige of segregation).

had not met their obligation to show that there were no disputes regarding *Freeman's* three-part test.¹⁶⁰ In essence, the district court ruled that the *Ho* plaintiffs had to show that the consent decree "remedies," which were not connected—let alone narrowly tailored—to proof of any past *de jure* discrimination, had "eliminated to the extent practicable"¹⁶¹ vestiges of that unproven discrimination to a class of persons who were never proven to have been harmed and, in any event, were long gone from the school district.

The court closed the opinion with a very small sop to the plaintiffs. It reminded the parties that it was aware of its obligations and power to terminate the decree *sua sponte*.¹⁶² Having just brushed away an excellent chance to do so, however, it seemed rather unlikely that the court would exercise this power anytime soon.

b. The Appeal to the Ninth Circuit

Upon receipt of the district court's opinion denying the motion for summary judgment, the attorneys for the *Ho* plaintiffs had to decide what to do next. Concerned that the district court would make unfavorable (and difficult to appeal) findings of fact if the case went to trial, the plaintiffs' lawyers explored the option of filing an interlocutory appeal. Although this strategy might delay trial further, it was possible that the *Ho* plaintiffs might obtain a ruling that the motion for summary judgment should have been granted on the legal issues, or at least get a more favorable ruling on the legal standards to be applied in any future proceedings.¹⁶³

The initial problem was deciding how to obtain that interlocutory appeal, which is disfavored in the federal system.¹⁶⁴ The *Ho* plaintiffs¹⁶⁵ decided to rely primarily on the statutory authority that an appeal is permitted as of right from an interlocutory order "granting, continuing, modifying, refusing, or dissolving, injunctions."¹⁶⁶ The Ninth Circuit panel agreed—but only to a point. It agreed that the district court's order

160. The court did not explain which portions of the test were factually in dispute. Nor did the court consider the larger point in *Freeman*, which was that district courts had the discretion to partially withdraw supervision from districts as facets of the desegregation plan were complied with. See *Freeman*, 503 U.S. 467. See generally Levine, *supra* note 112, at 615–21. Thus the court did not take the opportunity afforded by the motion for summary judgment to consider whether the district should at least be released from its obligations to maintain the racial/ethnic quotas while it continued to work on the goal of educational excellence.

161. Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991).

162. See *Ho*, 965 F. Supp. at 1327 n.15.

163. See *Ho*, 147 F.3d at 861 (noting strategy of plaintiffs).

164. See, e.g., Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).

165. By this point, the State Board of Education had hired new counsel and had joined in the plaintiffs' appeal because it had voted to change sides and become allied with the plaintiffs' position. See *Ho*, 147 F.3d at 860. The positions of the state superintendent of education and the department of education were in flux as they had to hire new counsel as well, so they remained neutral on the merits of the appeal. See *infra* text accompanying notes 317–326.

166. 28 U.S.C. § 1292(a)(1). As a back-up, the plaintiffs sought a writ of mandamus. Cf. *Bauman v. United States Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977) (setting forth the factors justifying a writ of mandamus in the Ninth Circuit).

fit within the statutory language as an order continuing the injunction enforcing the consent decree.¹⁶⁷ The panel also agreed that the plaintiffs alleged an irreparable injury—being subject to a racial quota and losing an entire school year under that assignment.¹⁶⁸ The panel majority, however, held that “proper resolution of any desegregation case turns on a careful assessment of its facts,” and the circuit court had not been supplied with facts found by the district court.¹⁶⁹ Thus, the panel majority (Judges Noonan and Trott) held that it was without jurisdiction to rule on the appeal under section 1292(a)(1).¹⁷⁰ Much to the chagrin of the defendants,¹⁷¹ however, the panel did not end its opinion right there. Instead, Judge Noonan wrote a full opinion to explain which issues remained for trial.

Judge Noonan¹⁷² first discussed what the court viewed as no longer in dispute—the school district’s use of racial classifications and quotas. The court noted that the defendants had filed affidavits denying the truth of plaintiffs’ claims regarding the operation of a system of racial classification and quotas. The court analyzed these affidavits in some detail.¹⁷³ Any

167. *See Ho*, 147 F.3d at 860.

168. *See id.* In the court’s view, this distinguished the *Ho* plaintiffs from the petitioners in *Switzerland Cheese Association, Inc. v. E. Horne’s Market, Inc.*, 385 U.S. 23 (1966), where the Supreme Court held that a denial of a motion for summary judgment was not appealable under the statute. *Cf. Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (permitting an interlocutory appeal when the denial of summary judgment would cause irreparable injury).

169. *Ho*, 147 F.3d at 860 (quoting *Freeman*, 503 U.S. at 474). The majority instructed the parties that “[the] normal way of adjudication is first the facts, then the decision of the district court, then the appeal. In a case where facts are critical, we cannot change this order of business.” *Id.* at 860–61.

170. The panel majority did not respond to the views of the dissent, written by Judge Evan Wallach. After quoting the above language from the majority, Judge Wallach pointed out that, whatever is the “normal way of adjudication,” Rule 56(c) entitles the moving party to summary judgment upon a proper showing. The nonmoving party must produce evidence of sufficient caliber or quantity, and cannot rest on allegations or denials or “some metaphysical doubt.” *Id.* at 866 (Wallach, J., dissenting) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Judge Wallach also noted that Rule 56(e)’s requirements were “not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.” *Id.* at 866 (citing *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 888 (1990)). Judge Wallach agreed with the majority that the defendants had produced conclusory statements on key remaining issues; for Judge Wallach, this meant that there were no genuinely contested issues of fact sufficient to support the denial of summary judgment or to deprive an appellate court of jurisdiction. *See id.*

171. *See San Francisco NAACP*, 59 F. Supp. 2d 1021, 1029 n.2 (noting the district court’s concern that months later the defendants continued to argue that the Ninth Circuit’s opinion was inconsistent with Supreme Court case law and that this was interfering with preparation of the case for trial).

172. Judge Wallach concurred in most of the majority’s opinion, crucially parting company as indicated in *supra* note 170.

173. *See Ho*, 147 F.3d at 857–59, 861–62. The court also quoted most of a colloquy with Aubrey McCutcheon, the school board’s chief counsel for the *Ho* and *SFNAACP* cases, in which the court attempted to get the attorney to explain what the term “race” meant for purposes of the decree. Mr. McCutcheon said he did not know what it meant; nevertheless, he refused to concede that the school board would “give up its racial forms so no one has to identify themselves.” *Id.* at 861. Judge Noonan used

conflicts of material fact between the affidavits submitted by the defendants "cannot create a triable issue of fact."¹⁷⁴ The appellate court agreed with Judge Orrick that there was "no doubt about the School District's intent and effort to enforce racial classification and quotas."¹⁷⁵

Judge Noonan then discussed why the use of race by government is so disfavored.¹⁷⁶ He pointed to its long use "as a way of oppressing, persecuting, or discriminating against a group of persons on the basis of alleged color or some other accidental physical attribute."¹⁷⁷ After reviewing notorious decisions such as *Plessy v. Ferguson*¹⁷⁸ and *Gong Lum v. Rice*,¹⁷⁹ Judge Noonan concluded that "[m]isuse of race by government for over three centuries in America must make any new governmental use of race stand suspect and in pressing need of justification."¹⁸⁰ He then reviewed the idea that race is a social, not a biological, construct.¹⁸¹ Here, he concluded, "[I]t is one thing . . . for a group to emphasize voluntarily the features that make it cohesive and confident and an entirely other thing

that colloquy to set up an important portion of his opinion. *See id.* at 861–65. "[H]ow can a system that in fact does use racial classifications and quotas work rationally without knowing what the central classifying concept means? The question points to the difficulty of the defendants' position." *Id.* at 864–65.

Judge Noonan, who engaged Mr. McCutcheon in the colloquy during oral argument, edited out the first part of the exchange. Judge Noonan began by asking Mr. McCutcheon what his own race was. Mr. McCutcheon seemed to catch Judge Noonan off guard by answering, "I don't know." Personal observation of the author at the oral argument, Apr. 15, 1998. It was not clear what point Judge Noonan had been trying to make or what he was planning to ask next had Mr. McCutcheon answered the question by stating his race. Perhaps the judge planned to ask, "How did that feel?" to illustrate the irreparable injury of classification by race.

174. *Ho*, 147 F.3d at 862.

175. *Id.* at 861–62. For example, the court referred to the affidavit of the officer in charge of student placement:

According to her, race did not enter into school admission, unless the race of the student in a particular school 'will exceed 45% in the regular school or 40% in the alternative school.' If that happened, 'another school is sought'—this delicate passive being employed to gloss over the compulsion exercised by the School District to force the seeking of another school.

Id. at 861. The court also rejected the contention that parents voluntarily provided information on the application forms. *See id.* at 862; *cf.* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (racial discrimination by private attorney exercising peremptory challenge becomes state action).

176. In this section, the court relied heavily on material supplied in the *Ho* plaintiffs' appellate brief. *See* Brief for Plaintiffs-Appellants at 6 n.2, *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1997) (No. 97-15926). Nevertheless, in the detailed treatment of the issue, one clearly sees the scholarly side of Judge Noonan, a long-time professor of law.

177. *Ho*, 147 F.3d at 862.

178. 163 U.S. 537 (1896). *Plessy* upheld the "separate but equal" standard.

179. 275 U.S. 78 (1927). In *Gong Lum*, the Supreme Court permitted a girl of Chinese ancestry to be barred from a school for whites and only allowed her to go to a school for "colored" children.

180. *Ho*, 147 F.3d at 863.

181. *See, e.g.*, IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, 27–33 (1996); IAN F. HANEY LOPEZ, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (both cited at 147 F.3d at 863).

for government to require racial self-designation and impose governmental sanctions for failure to do so and add further sanctions as the consequence of doing so."¹⁸²

The opinion then considered the "long history of governmental discrimination based on race [which] has marked the governmental treatment of persons of Chinese descent in California and in particular in San Francisco."¹⁸³ Given more than a century of official bias against those of Chinese ancestry locally, "it is especially hazardous to adopt racial classifications and racial caps that bear most heavily upon the class of plaintiff schoolchildren."¹⁸⁴

The last portion of this section of the opinion pointed out that race identifies groups, but "our rights belong to each of us as individual persons."¹⁸⁵ Quoting *Adarand Constructors*,¹⁸⁶ the court recognized that the Supreme Court has not excluded the use of race totally. It may be used "if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race."¹⁸⁷ But this is a "temporary expedient" to compensate individuals who themselves have been injured by the illegal use of race.¹⁸⁸ The court observed that if race were used as a surrogate for harm done to a group that was to be compensated by advantaging the group's descendants, "the Chinese schoolchildren of San Francisco would have an excellent case for preferences compensating for earlier wrongs."¹⁸⁹

Since race could be used permissibly only in a very limited fashion, the court saw two issues remaining for trial: "Do vestiges remain of the racism that justified paragraph 13 of the consent decree in 1983? Is paragraph 13 necessary to remove the vestiges if they do remain?"¹⁹⁰ The court

182. *Ho*, 147 F.3d at 863.

183. *Id.*

184. *Id.* at 864.

185. *Id.*

186. *See id.* (quoting *Adarand*, 515 U.S. at 224).

187. *Id.* (citing *Freeman*, 503 U.S. at 494).

188. The court used the analogy of a backfire to illustrate "how tight a hand must be kept on race lest, employing it to remedy racial evil, it slip out of control and inflict fresh harm." *Id.*

189. *Id.* at 864.

190. *Id.* at 865. Paragraph 13 is the section of the consent decree creating the racial caps. *See San Francisco NAACP*, 576 F. Supp. at 53-54. The court limited the inquiry because it believed that the district court had correctly ruled that the consent decree's propriety in 1983 was res judicata and binding on the plaintiffs. This ruling effectively fettered the possibility of raising one of the *Ho* plaintiffs' most important legal issues: how evidence the district court had found to be "weak" in 1983 could possibly be characterized as "strong" 15 years later.

In addition, the circuit court did not address the fundamental due process question of how parties approving of and defending the consent decree could purport to represent and bind parties opposing the decree. Thus, both courts, by doing nothing but point at the district court's previous statement that the SFNAACP's representation had been adequate, papered over central matters in the *Ho* case before the plaintiffs had had any real opportunity to pursue them. *Cf., e.g., Samuel Issacharoff, Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 822 (1997):

[*Martin v. Wilks*] must be read to reject collateral preclusion of third party claims as a result of bilateral settlements. The reason to reject such collateral preclusion is the overwhelming temptation to use the potential preclusive effect on third parties to subsidize the primary settlement. In blunt terms, when A is litigating

noted that the school district's affidavits asserted that vestiges of segregation remained. However, because information on this issue was "peculiarly within the knowledge and control" of the school district, the court warned that the district would have to "produce evidence more concrete than the conclusory statements in its affidavits."¹⁹¹ Further, the vestiges were to be connected to the discriminating policies and practices justifying the decree in 1983.¹⁹² The school district also had to demonstrate that paragraph 13 was still narrowly tailored to the problems caused by the vestiges of earlier segregation. Racial balancing was not a sufficient justification, unless it was shown to be necessary to correct "the effects of government action of a racist character."¹⁹³ The court made it abundantly clear that the school district had the entire burden of justifying the classification scheme under *Adarand's* strict scrutiny test.¹⁹⁴

The panel opinion concluded by observing that the district court was not in error by scheduling a trial for the early fall. The plaintiffs' injury was irreparable, but it needed to be corrected "only as rapidly as practicable."¹⁹⁵ With school assignments for the fall of 1998 already having been made, intervention by the appellate court, writing in June, would not give the plaintiffs any faster relief than a trial that gave the school board time to make adjustments, if needed, for the 1999-2000 school year.¹⁹⁶

As a technical matter, one could say that the plaintiffs lost because their appeal was dismissed and the trial court's denial of the motion for summary judgment was upheld. In reality, however, the opinion was a key victory for the plaintiffs. Without admitting that it was effecting any change, the circuit court had instructed Judge Orrick to place the entire burden of proof on the school district and to utilize strict scrutiny in ana-

against B, it is always easiest to settle when the two of them can make C pay for all or part of the cost of the settlement.

See also Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1027 (1993) (*Martin v. Wilks* "should be viewed not as an attack on the structural injunction, but as a necessary step in legitimating the structural injunction and assimilating it to the rest of our law."). For citations to other articles discussing the implications of *Martin v. Wilks*, see Issacharoff, *supra*, at 806 n.3.

191. *Ho*, 147 F.3d at 865. This is where Judge Wallach parted company with his colleagues. See *supra* note 170. He believed that since the party bearing the burden of persuasion at trial had failed in its obligation to put forth legally adequate evidence in response to the motion for summary judgment, it was improper to deny the *Ho* plaintiffs' motion for summary judgment.
192. The court did not explain how this might be done in light of the weak state of the evidence in 1983.
193. *Ho*, 147 F.3d at 865.
194. See *id.*
195. *Id.* (citing *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) (where the court called for "deliberate speed")). This observation ignored the rather more recent advice from the Supreme Court on the need for alacrity: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).
196. The court's laconic view of the schedule ignored the fact that the appeal had been pending in the Ninth Circuit since the late summer of 1997. Had the court taken up the case more quickly, as the plaintiffs had asked in seeking expedited review, yet another school year would not have passed. In the alternative, children who had been "capped out" in the school assignment process for fall 1998 could have been given some emergency relief over the summer.

lyzing the district's position. The school district officials were put on notice to come up with far better evidence than had been proffered in response to the motion for summary judgment. The opinion also ensured that racial balancing for its own sake would not be an acceptable rationale for maintaining a plan that supposedly benefited all children in the school district.¹⁹⁷ Even though the *Ho* plaintiffs came up one vote short of winning the motion for summary judgment outright, the gamble at the appellate court had paid off handsomely.

3. *On Remand: Preparing for Trial; Back to the Circuit; and Motions, Motions, Motions*

Having received the circuit's opinion in June 1998, and facing a September trial date, the parties, especially those defending the decree, had their work cut out. The parties renewed discovery in earnest, particularly as the *Ho* plaintiffs tried to pin down what the defendants would offer to meet the burden the Ninth Circuit opinion had imposed. In August 1998, the parties filed the required pretrial statement.¹⁹⁸ The statement showed that the parties still held widely varying views as to the core legal issues, such as who had the burden of proof, the level of scrutiny applicable to the consent decree, and whether the relative burden placed on plaintiffs was relevant to deciding the constitutionality of the consent decree.¹⁹⁹

197. One disappointment was that the circuit panel did not grapple with how the challenged plan could possibly be narrowly tailored or how its vaguely defined goal of academic excellence could withstand scrutiny. Cf. *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) ("Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own."). The district court did not persuasively distinguish the case. The circuit panel did not even cite *Jenkins*. It would have been instructive to see how the circuit court addressed the implications of the *Jenkins* opinion. For discussion of *Jenkins*, see, for example, Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 477 n.4 (1999) (collecting scholarship on *Jenkins*); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

198. Joint Pretrial Conference Statement, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Aug. 21, 1998) (No. C-94-2418-WHO).

199. For example, the *Ho* plaintiffs, the state superintendent, and the state board accepted that the Ninth Circuit had placed the burden of proof on the SFUSD to justify the racial classifications. The SFNAACP continued to maintain that case law in the public school desegregation context required that the *Ho* plaintiffs bear the burden of proving that the Consent Decree violated their rights under the Fourteenth Amendment. The SFUSD maintained that the issue was *res judicata*, and that the only question remaining was whether the classifications were still needed as part of the remedy. See *id.* at 8–11. The *Ho* plaintiffs, the state superintendent, and the state board all agreed that the Ninth Circuit had held that strict scrutiny applied. The SFUSD took the position that the Ninth Circuit's use of the term "racism" in the *Ho* opinion, rather than "de jure segregation" left the level of scrutiny question open. The SFNAACP called for intermediate scrutiny. See *id.* at 12–15. The *Ho* plaintiffs and the state board contended that it was not relevant to consider the impact or burden of the decree on *Ho* class members as compared to children of other racial or ethnic groups. The state superintendent and the SFNAACP contended that the impact on third parties, such as the *Ho* class, was very relevant. The SFUSD saw it as a non-issue because of its view that the validity of the decree had been established and confirmed. See *id.* at 15–18.

Also pending were many motions from different parties regarding discovery, expert witnesses, and the scope of trial.

Faced with this bewildering variety of positions, and concerned that the defendants were not adequately prepared for a mid-September trial, the court called the parties to an in-chambers conference.²⁰⁰ The upshot of the conference was that Judge Orrick vacated the trial date and appointed an experienced mediator, Thomas J. Klitgaard, as special master "solely for the purposes of presiding at settlement conferences."²⁰¹ These discussions proceeded in earnest over many long days and evenings in September 1998, but did not culminate in a settlement.²⁰² The court re-set the trial date for February 16, 1999, and established a pre-trial schedule for motions, disclosure of experts, completion of discovery, and the like.²⁰³

The parties, especially the *Ho* plaintiffs, started peppering the court with motions as they continued to skirmish and shape the case for trial in the months prior to the February 1999 trial date. Many issues came to a head in November and early December 1998. Judge Orrick's concern about what he viewed as the defendants' lack of adequate trial preparation became especially acute.²⁰⁴ Motivated in part by his desire to rectify that problem, Judge Orrick took it upon himself in November 1998 to set up an aggressive schedule for getting some assistance.

Judge Orrick's first step was to reappoint Thomas Klitgaard as special master. This time, Mr. Klitgaard's task was to take less than three weeks to "prepare a report for the Court setting forth the evidence in the Court record of discriminatory acts, policies and practices by state actors, at or prior to the time of the adoption of the Consent Decree in 1983."²⁰⁵ The parties were directed to prepare briefs setting forth their views on the appropriate legal standard for determining what is a vestige of discrimination. The court then proposed sending the special master's report and its order setting forth the legal standard of vestiges to the parties, each member of the consent decree advisory committee and the consent decree monitor.²⁰⁶ The committee members and the monitor were to prepare expert reports as to whether paragraph 13 of the decree remained necessary to remove any vestiges of discrimination.

200. See *San Francisco NAACP*, 59 F. Supp. 2d 1021, 1024-25 ("it immediately became apparent that defendants were utterly unprepared to go to trial").

201. Order, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Sept. 8, 1998) (No. C-94-2418-WHO) (appointing special master for settlement purposes).

202. For discussion of the settlement process, see *infra* Part III.D.

203. See Order, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Sept. 23, 1998) (No. C-94-2418-WHO).

204. See, e.g., Memorandum Decision and Order Re: Scope of Trial at 2, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. December 8, 1998) (No. C-94-2418-WHO). This must have been very puzzling to Judge Orrick because the lead attorneys for the SFNAACP and SFUSD were the same people he had dealt with in the two actions for twenty years. These were experienced lawyers whose skills he had praised highly. See, e.g., *San Francisco NAACP*, 576 F. Supp. at 48.

205. Order, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 20, 1998) (No. C-94-2418-WHO).

206. By this time, Stuart Biegel, a professor of education and law at UCLA, had replaced Paul Lawrence as the consent decree monitor. Because Professor Biegel was appointed pursuant to the SFNAACP consent decree, the attorneys for the *Ho* plaintiffs had no role in the selection of the new monitor.

At this point, it appeared that the court, confronted with the defendants' failure to prepare for trial, had decided to appoint a special master to do a substantial portion of what the defendants had not done to prepare the case. The prospect that the special master would comb the record for evidence he thought demonstrated the presence of discrimination prior to 1983 and then hand that report over to the "neutral" advisory committee to opine that indeed there were vestiges of discrimination was not appealing to the *Ho* plaintiffs. The *Ho* attorneys immediately objected and filed an emergency petition for a writ of mandamus with the circuit in early December.²⁰⁷ Fortunately, the Ninth Circuit panel took the concerns seriously. The panel stayed the preparation of the report and directed Judge Orrick to file a response to the petition.²⁰⁸

Judge Orrick noted that due to what he viewed as "an astonishing lack of cooperation from both parties in attempting to prepare this case for trial," he found it necessary to have someone, "an extra law clerk, a special master, or an expert,"²⁰⁹ review the evidence filed with the court prior to 1983. The master was only to examine the court record and not accumulate additional evidence. The court went on to make a surprising pronouncement: it could not modify or vacate the decree by "default."²¹⁰ The court felt it needed to know whether the original goals of the decree had been accomplished. "Because the parties have stubbornly persisted in arguing that the opposing parties have the burden of proof, despite the Ninth Circuit's clear ruling . . . the parties have not developed the record that the Court needs . . ."²¹¹ The court reviewed its plan to use the experts from the *SFNAACP* case: "By commissioning the Special Master's report,

207. The *Ho* plaintiffs had several objections. First, and most technical, was that the district court had not applied the correct legal standard for the appointment of a special master in a non-jury trial. The court had merely asserted that the issues were "complicated," which is the standard for appointment in a jury trial. In contrast, Fed. R. Civ. P. 53(b) provides: "in matters to be tried without a jury . . . a reference shall be made only upon a showing that some exceptional condition requires it." See *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (reversing appointment of special master where no exceptional condition shown); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 798-803 (1984) (discussing what might constitute an exceptional condition). Having not even cited the proper portion of the rule, the court made no attempt to meet the terms of the rule by making such a showing. Second, the *Ho* plaintiffs contended that it was inappropriate to assign the task, without the consent of all parties, to a person whom the court had appointed expressly for settlement purposes only and with whom the attorneys had shared numerous confidences as he strived to help mediate a settlement. Third, the *Ho* plaintiffs believed that the appointment was unwarranted as the court's evident purpose was to make up for the defendants' inability or unwillingness to prepare their own case.

208. FED. R. APP. P. 21(b)(4) provides for this procedure. This step was so unusual, it made the front page of one of the local legal newspapers. Paul Elias, *Putting S.F. Schools to the Test: Racial Quotas Case Stirs Up Judge, Educators, Affirmative Action Advocates*, S.F. RECORDER, Jan. 14, 1999, at 1 ("Rarely are trial judges asked by higher courts to add to the record with written briefs explaining their decisions. But then there's been nothing usual about *Ho* . . .").

209. District Court's Response to Emergency Petition for a Writ of Mandamus at 2, *Ho v. United States Dist. Court* (9th Cir. filed Dec. 9, 1998) (No. 98-71415).

210. See *id.*

211. *Id.* at 2-3.

and appointing as court-appointed experts the persons most knowledgeable about the extent to which the goals of the Consent Decree have been accomplished, the court will ensure that there is a complete record upon which to rule at trial."²¹²

The Ninth Circuit responded quickly. Issuing a terse order in less than a week, the circuit panel of Judges Noonan, Trott, and Wallach granted the writ.²¹³ It took note that "the defendants have denied that they have the burden of proof at trial and have resisted the holding to the contrary."²¹⁴ Further, "defendants, seven months after that decision and three months after this court understood that trial would take place, have failed to 'developed [sic] the record.'"²¹⁵ The appointment of the special master was "improper in the court assuming a burden that belonged to the defendants."²¹⁶ There were no "extraordinary circumstances" justifying use of a master when, as far as the district court was concerned, an extra law clerk could have done the work.²¹⁷ The circuit panel took note that the trial had been postponed for five months and that counsel for the school district had stated that the district, if it should lose in the February trial, would not be able to "desist from practices found to constitute racial discrimination."²¹⁸ The circuit made it clear that there needed to be prompt resolution of the issues and "immediate compliance with the outcome of the trial"²¹⁹ so that fall 1999 assignments would be in conformity with the judgment. The panel ordered the school district to pay the master's expenses in full since its failure to meet its obligations had caused the district court to make the appointment.

Oddly, the circuit court did not suppress the master's report. It directed the report be provided to the parties, but that it could not be "considered or used by the district court in any fashion unless it is filed by a party or parties."²²⁰ The court did not explain what the status of the report would have been if it were filed,²²¹ or why this option did not provide the defendants with the very assistance the circuit had just condemned in the previous paragraph of its order.

212. *Id.* at 4. One way of reading the court's response was that it, too, had "stubbornly persisted" in placing the burden of proof on the *Ho* plaintiffs. The court still seemed to be focused on using the trial to determine whether the goals of the consent decree had been accomplished, rather than whether the decree itself was constitutional. *Cf. Ho*, 147 F.3d at 865.

213. The fact that the same panel handled the motion for a writ indicated that any subsequent appeal from judgment issued after trial would also return to the same panel. This signal from the circuit may have affected the parties' internal calculations in deciding whether to settle the matter, as happened just two months later, or take their chances on further litigation.

214. Order at 2, *Ho v. United States Dist. Court* (9th Cir. filed Dec. 14, 1998) (No. 98-71415).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Cf. FED. R. CIV. P.* 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.").

Despite this apparent oddity,²²² the emergency appeal had much of its intended effect. The district court, although clearly stung by the accusation that it had interfered with the adversarial process, dropped its plan of commissioning its own expert reports.²²³ "From that point forward, the burden of gathering evidence rested entirely on defendants, who were ill prepared to present such evidence at trial because of their ongoing dispute over the burden of proof."²²⁴

But this burden was not quite "entirely on defendants." The day before the district court filed its reply with the circuit court, Judge Orrick issued an important ruling regarding the use of expert witnesses. The defendants had named the members of the court's advisory committee and the consent decree monitor as experts they intended to call as witnesses in their respective cases in chief. Further, the defendants largely resisted having the experts file reports in advance of testifying. The *Ho* plaintiffs moved to exclude testimony by the people the court had appointed to assist it over the years and from those expected to be called as experts who had not provided reports by the date the court had set for the submission of expert reports.

The court's detailed opinion first defined the roles played by court-appointed experts, special masters, and technical advisors. The court then reviewed its own complex relationships with the various proposed witnesses. It first reviewed the broad scope of duties the court had delegated to Dr. Gary Orfield over and over since 1982.²²⁵ The court noted that in addition to official duties, it had "regularly consulted with Orfield in confidence on many issues involving the decree."²²⁶ The court reviewed the roles of the other proposed witnesses. Based on the quasi-judicial and confidential roles the various people had played over the years, the court excluded a great variety of matters from exploration at deposition or as trial testimony. The court did not exclude any of these people from testifying entirely, however.²²⁷ It left open deposition and trial testimony on "[t]heir unparalleled knowledge of the effects of the Decree on the desegregation of San Francisco's schools, and their views on the propriety of vacating or modifying the Decree."²²⁸ In rejecting the *Ho* plaintiffs' con-

222. The district court later called it a "peculiar order." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 n.2 (N.D. Cal. 1999).

223. See Order at 2, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 18, 1998) (No. C-94-2418-WHO).

224. *San Francisco NAACP*, 59 F. Supp. 2d 1021, 1029 n.2.

225. The court identified seven important tasks it had officially appointed Professor Orfield to perform in the *SFNAACP* case in the preceding fifteen years. These included heading court-appointed committees, and serving as special master and as court-appointed expert witness. See Memorandum Decision and Order re: Court Experts at 4-6, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 8, 1998) (No. C-94-2418-WHO) [hereinafter Memorandum Decision and Order re: Court Experts].

226. *Id.* at 6.

227. Writing even before the court issued this order, Uradnik, *supra* note 4, at 136, questioned whether Judge Orrick had become "too enamored with his experts," paying more attention to them than to outside calls for reform and modification of the decree.

228. Memorandum Decision and Order re: Court Experts, *supra* note 225, at 8-9. At the time this order issued, the court still assumed that it would be able to get reports

tention that it was inappropriate to allow the defendants to use experts who had had such a long association with the court, the court gave plaintiffs the assurance that they were equally entitled to present testimony from these same experts. Moreover, the court hastened to assure plaintiffs that "[t]he court has never found any of the experts to be biased, but to the extent plaintiffs disagree, they may attempt to bring out that perceived bias during examination at trial."²²⁹

The court did require the defendants to provide expert reports, even though the defendants took the position that they had not retained or specially employed any of the experts to present testimony. The court felt that in this case, it was "completely unrealistic to expect anyone to give extemporaneous expert testimony on the complex issues involved," or for plaintiffs to effectively prepare rebuttal testimony without reports.²³⁰ Even though the court's extended deadline for expert reports had expired one month previously, the court granted the defendants an additional month to file expert reports. Many of these hurriedly prepared reports proved to be inadequate.²³¹

The plaintiffs tried pressing the defendants on other fronts with mixed results. A second motion for summary judgment was summarily denied on the grounds that the circuit had ordered a trial to take place.²³² The companion motion for a preliminary injunction²³³ stopping defendants from implementing paragraph 13 of the decree made better headway, however. The court concluded first that the plaintiffs had a strong likelihood of success on the merits.²³⁴ The court, however, held that the motion "stumbles" on the irreparable injury requirement.²³⁵ Assuming the February trial date would lead to a spring post-trial opinion, the court saw "no difficulty in ordering the SFUSD to reassign the students pursuant to a race-neutral assignment plan for the 1999-2000 school year if

from these same experts on remaining vestiges based on the special master's culling of evidence of *de jure* segregation. That plan did not collapse for another six days.

229. *Id.* at 9.

230. *Id.* at 10.

231. See *San Francisco NAACP*, 59 F. Supp. 2d 1021, 1030 (court later struck many of SFNAACP and local defendants' expert reports in January and February 1999 as "too conclusory;" others contained "minimal testimony attempting to link current problems in the SFUSD to acts of racial discrimination by the government prior to 1983"). For a discussion of the experts' reports, see *infra* Part III.C.

232. See Memorandum Decision and Order re: Preliminary Injunction at 4, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 10, 1998) (No. C-94-2418-WHO) [hereinafter Memorandum Decision and Order re: Preliminary Injunction].

233. Having been forced to give up the September 1998 trial date, with a mid-February 1999 trial scheduled, and the school district planning to announce assignments for the fall in March, the *Ho* plaintiffs did not want to be told after a lengthy trial that it was too late to adjust the school assignments for the fall.

234. See Memorandum Decision and Order re: Preliminary Injunction, *supra* note 232, at 12. The court noted that the defendants had not made any attempt to identify the discriminating policies and practices that justified the decree in 1983; "[w]ithout doing so, they cannot meet their burden of demonstrating that any current problems in the SFUSD are vestiges of those earlier discriminating policies and practices." *Id.* at 11. In addition the evidence submitted was "conclusory and anecdotal," despite the Ninth Circuit's earlier warning. *Id.* at 11-12.

235. See *id.* at 12-13.

plaintiffs prevail at trial."²³⁶ Thus there was no need to be concerned about irreparable injury. In addition, since the court had "no qualms" about ordering immediate re-assignments if the plan were found unconstitutional, the court warned the district that it "would be wise to develop a race-neutral assignment plan that can be implemented immediately" if necessary.²³⁷

Not all of the court's rulings in this time period were so much to our liking. The state superintendent filed a motion in limine seeking to define the issues to be presented at trial. The essence of this dispute was whether the trial's scope included the propriety of dissolving the decree or whether the *Ho* plaintiffs were limited to challenging the student assignment plan only. In its ruling, the court noted that the complaint had challenged only the decree's system of assigning students based on racial and ethnic criteria. In its view, however, the plaintiffs had made their wider intention known in the course of resolving other motions. The court noted, nonetheless, that the entire focus of the case had been the assignment system. Thus, the court framed the issues for trial as: (a) whether the assignment system was constitutional today; and (b) if not, should the court dissolve the consent decree, or merely modify or eliminate the assignment system alone. The court made clear its belief that "a finding that students no longer need to be assigned to schools by race does not necessarily require dissolution of the Decree in other areas."²³⁸ The court said that it would not permit evidence or argument on any of the *Green* factors,²³⁹ except student assignments; the parties were permitted to attempt to prove whether retention of the system was appropriate and necessary to achieve the goals of other provisions of the decree.²⁴⁰ Although the trial would not be treated as a unitary status hearing, the plaintiffs would be permitted to argue that the decree should be dissolved because of the alleged invalidity of the student assignment system.

This decision did not upset the plaintiffs' immediate plans for the trial. The *Ho* plaintiffs certainly had no intention of taking on the burden of proving that the school district had attained unitary status by eliminating all vestiges of *de jure* segregation. Indeed, because of the lack of findings specifying what acts of *de jure* segregation the school district had committed, it seemed nearly impossible to accomplish this task, as the defendants were discovering. Having gone to the Ninth Circuit to avoid

236. *Id.* at 14.

237. *Id.* at 15. A few days later, prodded by the Ninth Circuit's writ, the court ordered the district's contingency plan to be filed by February 1, 1999, two weeks prior to the commencement of the trial. See Order at 2, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 18, 1998) (No. C-94-2418-WHO). Overall, even though the *Ho* plaintiffs "lost" the motion for a preliminary injunction, they had really achieved a significant gain.

238. Memorandum Decision and Order Re: Scope of Trial at 6, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 8, 1998) (No. C-94-2418-WHO) [hereinafter Memorandum Decision and Order Re: Scope of Trial].

239. See *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (instructing courts to consider "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities" as well as student assignments).

240. The court cited *Freeman*, 503 U.S. at 490–91. See Memorandum Decision and Order Re: Scope of Trial, *supra* note 238, at 6–7.

shouldering this difficult burden,²⁴¹ the *Ho* plaintiffs were not about to take it on now. Rather, if the defendants failed to demonstrate that the student assignment system was constitutional, the response would be that there was no federal interest justifying the continuation of the decree either as a matter of subject matter jurisdiction or federal power.²⁴² As a result, the court would be obligated to dissolve the decree.

The success of this argument would depend on the reasoning the court employed to support the conclusion that the student assignment system was unconstitutional. There seemed to be three possible ways to reach that conclusion, with different outcomes resulting from each. First, if the court were to hold that the defendants had failed to prove that there was a compelling governmental interest justifying the decree (i.e., a strong basis in evidence that there had been *de jure* segregation prior to 1983), this conclusion should have led to dissolution of the decree as a matter of law. Second, the court could hold that the student assignment system was driven by a compelling interest but was not narrowly tailored; if so, the court would probably modify the assignment system but would not dissolve the decree. As this had become the position of the state superintendent, it was certainly possible that the court would have seized upon this formula as a way to satisfy nominally the *Ho* claims and still keep the decree alive. If done carefully and with a proper record, a decision on this basis would be relatively insulated on appeal as one part would be based on fact-finding, subject to the clearly erroneous rule, and the other part would be reviewed under the abuse of discretion standard.²⁴³ Third, the court might have found that the vestiges of segregation concerning student assignments had been eliminated, but that the student assignment system was needed to help address lingering vestiges in other facets of the school system. The court's order certainly hinted that it wanted to hear argument from defendants to this effect. Here again, the court seemed to be trying to help the defendants save the decree. Furthermore, since *Freeman* made it clear that withdrawal of supervision in this situation was a matter for the discretion of the trial court, such a decision would have been difficult to overturn on appeal under the abuse of discretion standard.²⁴⁴

241. On the weight of such a burden, see Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 763–64 (1991) (inquiry to prove what school system would look like absent vestiges “is likely to be empirically unanchored, indeed, chimerical”); Joondeph, *supra* note 28, at 219 (discussing why task is “impossible”).

242. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995); *Evans v. City of Chicago*, 10 F.3d 474, 478–79 (7th Cir. 1993) (en banc) (in justifying the implementation of a consent decree, “the court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on the rule of federal law rather than the bare consent of the officeholder”), *cert. denied*, 511 U.S. 1082 (1994).

243. In fact, the *Ho* plaintiffs might not even have been able to appeal a ruling made on this basis because they would have been the prevailing party. Thus the district court might have given the *Ho* plaintiffs relief on their main issue, the quotas, but effectively precluded them from further participation in the suit once the assignment system had been disapproved by the court.

244. See Levine, *supra* note 112, at 615–21, 641–42 (discussing the discretion afforded district courts under *Freeman*). See generally Evan Tsen Lee, *Principled Decision Making and the Proper Role of Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV.

Just before trial was to begin, the court provided yet another clue that it would do its best to preserve the decree—if the defendants helped. In February 1999, with just a week before the delayed trial was scheduled to start, Judge Orrick noted, *sua sponte*, that he had never issued a ruling on the appropriate legal standard for determining vestiges of discrimination.²⁴⁵ The court thought it would “streamline the trial”²⁴⁶ if the parties were aware of the legal standard the court planned to apply to this issue. In discussing the primary precedent from the Supreme Court, the district court noted that the Supreme Court had never explicitly defined the term “vestiges.”²⁴⁷ The court determined that its definition would be:

[A] vestige of segregation or discrimination within the meaning of the Supreme Court’s desegregation case law, exists when (1) there exists a current condition in the school system that is likely to convey the message of racial inferiority that is implicit in a policy of segregation; and (2) that current condition is caused, at least in part, by the intentional racially discriminatory policies and practices by government officials that justified the Consent Decree at its inception. A current condition in the school system cannot be considered a vestige of discrimination if it is caused entirely by factors other than the intentional racially discriminatory policies and practices by government officials that justified the Consent Decree at its inception.²⁴⁸

The court’s announced legal standard seemed to tip unduly in favor of the defendants. For example, the court drew the first part of the test from Justice Marshall’s dissent in *Dowell*.²⁴⁹ Given that Justice Marshall went on to complain that the standard the majority enunciated in *Dowell* moved *away* from what he saw as the proper meaning of vestige, it seemed plainly incorrect for Judge Orrick to rely on Justice Marshall’s failed position.²⁵⁰ The second part of the test seemed to make the defen-

235, 266–78 (1991) (discussing standards of appellate review of court-ordered remedies in school desegregation litigation).

245. Having abandoned the plan to commission its own expert reports because of the Ninth Circuit’s ruling, the court had not established the legal standard on the schedule it had intended originally. See Order Re: Legal Standard for Determining Vestiges of Discrimination, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Feb. 10, 1999) (No. C-94-2418).

246. *Id.* at 2.

247. See *id.* at 2–4 (citing, *inter alia*, *Board of Educ v. Dowell*, 498 U.S. 237, 249 (1991); *Freeman v. Pitts*, 503 U.S. 467, 492 (1992); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979)).

248. *Id.* at 5.

249. See *id.* at 3 (quoting *Dowell*, 498 U.S. at 260–61 (Marshall, J. dissenting)).

250. See, e.g., Note, *Ignoring the Soul of Brown: Board of Education v. Dowell*, 70 N.C. L. REV. 615, 635 (1992) (“The clear mandate of Supreme Court precedent before *Dowell* required school districts to remove all vestiges of past discriminatory practices. In *Dowell* the Court slipped subtly, and perhaps pragmatically, to requiring the removal of discriminatory vestiges to the extent practicable.”); Levine, *supra* note 112, at 627 (under Justice Marshall’s position, “it might prove impossible for any school system to demonstrate that it had completely eradicated the stigmatic harm resulting from its past wrongs”).

dants' burden of demonstrating causation relatively easy to meet.²⁵¹ As the district court did not include in its test any of the cautionary language it had quoted from *Freeman* and *Jenkins* earlier in the opinion,²⁵² it was unclear what its relevance would be to the court's ultimate decision.

Thus, on the eve of trial, one could have definite and firm conviction that the court would do its best to preserve the essence of the decree it had approved and presided over for so long,²⁵³ if the defendants provided even the barest evidentiary ammunition to do so. Moreover, by endorsing the district court's premature ruling on the constitutionality of the consent decree and the SFNAACP's adequacy of representation as of 1983, the Ninth Circuit had effectively deprived the *Ho* plaintiffs of one of their key contentions—that the “weak” evidence for the consent decree's entry in 1983 was insufficiently “strong” to justify the continuation of the decree's race-conscious quota system. Indeed, in some ways, despite the Ninth Circuit's ruling on the burden of proof,²⁵⁴ the true posture of the case was that the *Ho* plaintiffs in effect all but had to prove the absence of present vestiges of discrimination under an unfavorable definition of vestiges and their causes. As a result, the nature of the evidence to be presented at trial was critical.

C. The Experts Weigh In

As the trial date approached, the parties moved to complete pre-trial preparations. Since no historical facts were in dispute, most of the pre-trial work revolved around the testimony of experts, who would be opining as to whether they did or did not detect the presence of vestiges in the school district's operations. This evidence would be crucial in light of the court's previous rulings. In the San Francisco case, there were several overlapping sources of expert opinion. Two sources of expertise—the state monitors and the advisory committee—filed reports with the court during this period. In addition, the parties identified experts (including the state monitor and members of the advisory committee) and had them generate reports about their conclusions. These reports reveal the con-

251. Cf. *United States v. City of Yonkers*, 181 F.3d 301, 311 (discussing allocation of the burden of proof in a case with a “counterintuitive alignment of parties” and an absence of vestiges detectable by the *Green* factors, circuit court holds that burden of proving vestiges of segregation rests with those parties, including the school board, who contend that such vestiges exist), *vacated and remanded on rehearing*, 197 F.3d 41 (2d Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 801 (1st Cir. 1998) (“the School Committee must identify a vestige of bygone discrimination and provide convincing evidence that ties this vestige to the de jure segregation of the benighted past”).

252. See Order Re: Legal Standard for Determining Vestiges of Discrimination at 3–4, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Feb. 10, 1999) (No. C-94-2418) (quoting *Freeman* and *Jenkins*). For example, the court's enunciated legal standard did not include *Freeman*'s caution that the more remote in time the *de jure* violation, “the less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* violation.” *Freeman*, 503 U.S. at 496.

253. Uradnik, *supra* note 4, at 136, observed a few months before the trial was to start: “Given Judge Orrick's background as a civic activist and civil rights supporter, it is plausible to suggest that he has not only a professional stake, but also a personal stake” in the continued successful operation of the consent decree.

254. See *Ho*, 147 F.3d at 865.

tours of the case the defenders of the decree were preparing to present at trial.

1. *The Consent Decree Monitor*

In July 1998, Professor Stuart Biegel, the new consent decree monitor for the state, issued his annual report. This was the first report his monitoring team issued after a full year of school site visits, meetings and review of documents and data.²⁵⁵

In examining the results under the consent decree's mandate to eliminate racial/ethnic segregation and identifiability from any school, program or classroom in the district, the 1998 Monitor's Report concluded, "the district continues to be substantially in compliance with . . . regard to school-by-school-desegregation."²⁵⁶ The same could not be said for desegregation of programs and individual classrooms. The 1998 Monitor's Report did not suggest, however, that the racial and ethnic composition of the programs and classrooms resulted from any lingering vestiges of *de jure* segregation.²⁵⁷ Rather, the report attributed this finding to three factors: (a) "classrooms where limited-English proficient students . . . were separated out for purposes of language acquisition;" (b) classrooms that were "predominately" or "almost entirely" African American "as a result of the fact that most other students in the school were placed in bilingual programs;" and (c) middle and high schools "where students were grouped on the basis of perceived ability, often resulting in a disproportionate number of African American and Latino students being placed in the 'lower' level classrooms."²⁵⁸

255. See Stuart Biegel, San Francisco Unified School District Desegregation, Paragraph 44 Independent Review, Report No. 15, 1997-1998, at 1-2, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed July 31, 1998) (No. C-78-1445-WHO) [hereinafter 1998 Monitor's Report]. The detailed report is 175 pages long. The text of this section of the Article highlights the 1998 Monitor's Report because this was the most recent report from the monitor's team available to the court and the parties on the eve of trial. In order to keep the Article as up to date as possible, the footnotes of this section also refer to the Monitor's Report issued in July 1999, as appropriate. See Stuart Biegel, San Francisco Unified School District Desegregation, Paragraph 44 Independent Review, Report No. 16, 1998-1999 (N.D. Cal. filed July 29, 1999) (No. C-78-1445-WHO) [hereinafter 1999 Monitor's Report].

256. 1998 Monitor's Report, *supra* note 255, at 28; see also *id.* at 1. The report also noted the racial/ethnic breakdown as of 1998: Latino (21.2%), Other White (13.0%), African American (16.6%), Japanese (1.0%), Chinese (27.3%), Korean (1.1%), Other Nonwhite (12.0%), Native American (0.7%), Filipino (7.2%). See *id.* at 27. These figures reflect the continued trend of an increasing percentage of "Chinese" and "Latino" students and a decreasing percentage of "Other White" and "African American" students. See *id.* at 28; cf. figures presented in note 36. In contrast, Asian Pacific Americans, in total, now constitute just 3% of the population in the entire country. See Chin et al., *supra* note 3, at 131.

257. The 1998 Monitor's Report praised the good intentions and commitment of educators and administrators in this regard. See 1998 Monitor's Report, *supra* note 255, at 46.

258. *Id.* at 30. The report noted that 29.5% of the students in the district were classified as limited-English proficient. See *id.* at 30 n.31.

Calling this "perhaps the most significant hurdle that must be overcome by the district"²⁵⁹ to reach compliance with the consent decree, the 1998 Monitor's Report also recognized the complexity of the issue. It contrasted the "clear" language of the consent decree with the fact that "[t]he majority of educators believe . . . that at least some grouping of students based on language skills and/or prior academic achievement will enable schools to more effectively meet the needs of the students and the community."²⁶⁰

The monitoring team reported on other related matters as well. For example, the 1998 Monitor's Report concluded that while individual sites in the district may have achieved a staff reflecting the diversity of the students, overall the district had not made much more progress since the last annual report in meeting that goal.²⁶¹ The monitoring team did not report on the state of the district's compliance with the exact terms of the original agreement.²⁶² With respect to discipline,²⁶³ the monitoring team "uncovered no evidence to indicate any unfairness or lack of consistency in the discipline process." Nevertheless, the report noted that "the perception still exists in certain quarters that the district's discipline process is unfair and/or inconsistent."²⁶⁴

The closest the 1998 Monitor's Report came to the issues involved in the *Ho* suit²⁶⁵ was a fairly delicate and brief discussion of the numerical requirements of the consent decree.²⁶⁶ For example, the 1998 Monitor's

259. *Id.* at 46–47. The 1999 Monitor's Report noted that the interface between desegregation and language acquisition continued to be a central issue needing attention at the district level, but that there was a "disconnect" between program offices addressing the two issues. See 1999 Monitor's Report, *supra* note 255, at 69–70.

260. 1998 Monitor's Report, *supra* note 255, at 47. The 1998 Monitor's Report noted that, unlike the specific quotas established for each school, the consent decree did not provide any specific requirements for desegregation by classroom or program. The report suggested, as "research and inquiry questions," whether it might be possible to reach a consensus on some of these matters within the consent decree framework. *Id.* at 47. No consideration was given to whether the court was legally entitled to continue to pursue this effort in light of the challenges raised by the *Ho* plaintiffs.

261. See *id.* at 65.

262. Cf. *San Francisco NAACP*, 576 F. Supp. at 57 (quoting from ¶ 34 of the consent decree: "the S.F.U.S.D. shall continue to implement a staffing policy . . . the goal of which is 'to achieve a staff at each school site and District location that will reflect the student population of the District'").

263. See *id.* at 57 (¶ 38).

264. 1998 Monitor's Report, *supra* note 255, at 72.

265. The lawsuit is never mentioned directly in the 1998 Monitor's Report. The 1999 Monitor's Report, *supra* note 255, at 13–14, filed after the court approved the settlement, attributes this silence to the fact that *Ho* was pending.

266. See 1998 Monitor's Report, *supra* note 255, at 53–55. Another delicate and fairly brief discussion concerned the allocation of consent decree funds. Professor Biegel did not directly follow up on the strong signals his predecessor, Paul Lawrence, had sent regarding the appropriateness of expenditures of the funds. Instead, the 1998 Monitor's Report noted that school personnel frequently raised the issue of "equitable allocation" of the funds (i.e., the funding formulae between schools) to the monitoring team. *Id.* at 131. The 1998 Monitor's Report noted that the funding varied widely from as little as \$42,000 to \$1,740,000 per targeted school annually. See *id.* The report merely noted obliquely that "there are a range of competing interests that must be reconciled before new allocation policies can be developed over the next few years." *Id.* at 132. The 1998 Monitor's Report did not specify what those competing interests

Report noted "a growing number of people within the community have come to believe that certain district practices—and, indeed, certain Consent Decree requirements themselves—no longer reflect the changing demographics and the growing transformation in neighborhood residential patterns and student socioeconomic status. . . ."²⁶⁷ The 1998 Monitor's Report did not make specific recommendations nor did it otherwise relate these concerns to the legal standards for continued court supervision of the district.

The 1998 Monitor's Report did contain substantial data regarding the academic achievement component of the consent decree. The report spent a great deal of time analyzing standardized test results. In brief, the results showed that students were "improving across the board," but African American and Latino students still scored much lower on average than students of other races and ethnicities.²⁶⁸ The report noted that urban

might be, or how the school district or the court might go about making sure that tens of millions of dollars in consent decree funds were being spent appropriately. The 1999 Monitor's Report noted "no perceptible change" over the ensuing year. 1999 Monitor's Report, *supra* note 255, at 172.

The 1998 Monitor's Report also noted an ongoing controversy between the state and the school district regarding whether the district was getting full reimbursement for implementations costs. The difference amounts to about \$5 million per year on approximately \$36,000,000 of claimed costs annually for both 1996-97 and 1997-98. See 1998 Monitor's Report, *supra* note 255, at 138-39. The on-going dispute about these reimbursements was one reason the superintendent of schools left his position in April 1999. See Julian Guthrie & Seth Rosenfeld, *Schools Shocker: Rojas Quitting*, S.F. EXAMINER, Apr. 23, 1999, at A1; see also Matier & Ross, *School Play*, S.F. CHRON., Mar. 8, 1999, at A19 (discussing "three years of fiscal frustration" in state capital with the superintendent). The controversy over the reimbursements continues. See 1999 Monitor's Report, *supra* note 255, at 176-78 (disputed amount then exceeded \$18,000,000).

The school district's overall expenditures continue to be a matter of some concern. An August 1999 report by auditors from the State's Fiscal Crisis and Management Assistance Team has found a "pattern of overspending, improper borrowing and lax practices." Nanette Asimov, *S.F. Schools Founder in Budget Math*, S.F. CHRON., Nov. 20, 1999, at A17. The district's accounts have not been properly reconciled for at least a year and a half. See *id.*; see also Lisa Davis, *Making Education Pay*, S.F. WKLY., Sept. 22, 1999, at 15 ("For consultants, the S.F. school district ATM is wide open."); Julian Guthrie, *Fiscal Fiasco at S.F. Schools*, S.F. EXAMINER, Apr. 6, 2000, at A1 (audit revealed "significant deficiencies in how the district keeps its more than half-billion-dollar annual budget").

267. 1998 Monitor's Report, *supra* note 255, at 54. The 1998 Monitor's Report mentioned that the original categories might be "anachronistic" in view of the fact that they separate out three groups who are each no more than one per cent of the school population, but put much larger groups, primarily other Asian and Pacific Island groups, into a single "Other Non Whites" category. The report also noted that some find it important to consider the growing number of students of mixed race. The same points are repeated in the 1999 Monitor's Report, *supra* note 255, at 51; see also Sonya M. Tafoya, *Check One or More . . . : Mixed Race and Ethnicity in California*, CAL. COUNTS: POPULATION TRENDS AND PROFILES, Jan. 2000, at 1 (multiracial/ethnic births in the state now exceed 14%). Finally, the 1998 Monitor's Report noted ongoing concerns in schools where most of the students are in poverty and there is a need to enhance the ability to provide effective language acquisition programs. See 1998 Monitor's Report, *supra* note 255, at 55.

268. 1998 Monitor's Report, *supra* note 255, at 13. The monitoring team found the same pattern a year later. See 1999 Monitor's Report, *supra* note 255, at 118.

educators faced similar problems nationally,²⁶⁹ including decreases in test scores at the high school level.²⁷⁰ The 1998 Monitor's Report, in summarizing its findings, noted that "SFUSD comes across in a very positive light overall, particularly in comparison with all the schools and school districts that we have visited across the country and around the world."²⁷¹

2. The Advisory Committee

In January 1999, the Consent Decree Advisory Committee, headed by Gary Orfield, filed a report with the court; the long report was its first since 1992. The report, entitled *Progress Made, Challenges Remaining in San Francisco School Desegregation*,²⁷² reviewed the five years of experience since the consent decree was revised in 1993. As the title suggested, the report discussed the progress made to date and the work that the Committee thought still needed to be done in the school district.

As one would expect, the report reflected the views of its members, especially Gary Orfield, its chair.²⁷³ After presenting an Executive Summary, the first portion of the report reviewed the history of the workings of the consent decree from its inception. As in 1992, the Advisory Committee once again heaped praise upon the innovative work done in the school district, with the guidance of the experts on the Advisory Committee, all "watch[ed] carefully" by the court.²⁷⁴ The goal now was said to be "to free the district from court supervision as soon as the historic inequalities have been remedied."²⁷⁵ This day was clearly very far off, in the Committee's view.²⁷⁶

If it weren't for rather oblique references, one would never know that this report coincidentally was filed with Judge Orrick one month before he was to begin to hear the *Ho* trial as the sole finder of fact. The only real reference in the report to the impending trial was a contrast between the "process of experimentation, learning, and professional cooperation stimulated by external accountability through the court's committee and the

269. The report also praised then-Superintendent Rojas for being one of the national leaders in being "sensitive to the needs of African American and Latino students." 1998 Monitor's Report, *supra* note 255, at 14.

270. *See id.* The report made no effort to explain any of these matters in terms of how they might constitute lingering vestiges of *de jure* segregation still remaining in the school district.

271. *Id.* at 24.

272. *Progress Made, Challenges Remaining in San Francisco School Desegregation*, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Jan. 1999) (No. C-78-1445-WHO) [hereinafter 1999 Advisory Committee Report].

273. The six member Advisory Committee consisted of the group the court appointed in 1993, including the nominees of the NAACP (Robert Green), the state superintendent (Gwen Stephens), the SFUSD (Hoover Liddell) and the two intervenors, META (J. David Ramirez) and Chinese for Affirmative Action (Laureen Chew). Two (Orfield and Green) had been members of the team who devised the 1983 consent decree plan and had served on the Expert Committee in 1992. All were designated as potential expert witnesses for the defenders of the consent decree, although ultimately only four, Orfield, Green, Ramirez, and Liddell, filed expert reports. *See infra* Part III.C.3.

274. 1999 Advisory Committee Report, *supra* note 272, at 3.

275. *Id.* at 8.

276. *See id.* at 65 ("We are only a few years [i.e., since 1993] into the reforms under the revised Decree and special conditions . . . make it hard to evaluate effects.").

state monitor," and the consequences "[i]f this city were to lose this framework and the major programs and hundreds of young teachers funded by the Consent Decree funds from the state."²⁷⁷ With the exception of a small section discussing "the battle over desegregation standards," which contains much praise for the change in the admissions process at Lowell High School, the Committee never addressed the concerns of the *Ho* class in its report.²⁷⁸

The 1999 Advisory Committee instead focused on what in its view remained to be completed, according to the Committee's members.²⁷⁹ Given the expansion of the Committee due to concerns expressed by the intervenors in *SFNAACP* for students of limited English proficiency, many of the recommendations were devoted to that issue. None of the recommendations were framed in such a way that one could easily assess whether the goal had been accomplished;²⁸⁰ the idea that the legal goal of the consent decree had to be to eradicate the lingering effects of proven *de jure* segregation to the extent practicable was nowhere to be found in the report.²⁸¹ Instead, the report was filled with laudable goals and innovative

277. *Id.* at 8.

278. *Id.* at 101–03. This section of the report did not mention that the 40% quota for each ethnic group remained in effect at Lowell while praising the modified policy for meeting the major concerns of: "1) turning away highly qualified Chinese students because of over-representation and 2) maintaining integration reflective of the San Francisco community." *Id.* at 102. The report notes that the committee met with "many of those concerned." *Id.* at 101. *But see* Uradnik, *supra* note 4, at 92–94 (reporting that Amy Chang found Orfield "hostile" and "defensive" when she discussed her concerns).

279. For example, the Committee praised the district for "real gains in achievement," because of increasing test scores for non-limited English proficiency ("LEP") students. 1999 Advisory Committee Report, *supra* note 272, at 82. However, the Committee pointed out because San Francisco had a "unique" policy of not testing LEP students who had been in the district for less than 30 months, it was difficult to make "useful comparisons" with other districts in the state. *Id.* at 81–82. The Committee called for more comprehensive inclusion of students tested. *See id.* at 84. Also, the Committee was concerned that the "pattern of unequal educational growth by race, noted in the Committee's 1992 report, seems to be persisting." *Id.* at 85. Thus, the Advisory Committee concluded, "[a]lthough the overall achievement trend is healthy, there is still a great deal of work to be done to equalize educational gains." *Id.*

280. For example, the 1999 Advisory Committee Report called for "creating educationally beneficial racial integration within schools;" "providing coherent and consistent professional development for teachers and administrators on the goals, resources, and accomplishments of the Consent Decree plans with training on methods for dealing successfully with problems of race and language in building successful multiethnic schools which have strong curricula including mastery of two languages;" "strengthening the educational opportunities in high school for African American, Latino, and LEP students to substantially increase their graduation rates and their level of preparation for post-secondary education;" and "strengthening the benefits and reducing the costs to teachers and schools of Reconstitution and the Comprehensive School Improvement process." 1999 Advisory Committee Report, *supra* note 272, at iv; *cf.* Gary Orfield, *Toward an Integrated Future*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 331, 350 (Gary Orfield et al. eds., 1996) ("Good monitoring requires the courts to set specific goals against which to evaluate compliance.").

281. Also missing was any reference to the questionable expenditure of funds that a former member of the committee, Paul Lawrence, had identified before he was relieved of his duties as state monitor. *See supra* note 88; *cf.* Plaintiffs' Rebuttal Expert Witness

ideas proffered by the members of the Advisory Committee, steeped in education theory and practice, but seemingly unfettered by the legal concepts that strictly limit federal court intervention into local governmental affairs.

Meeting the Committee's ambitious goals would have been even more difficult because some of them were contradictory. For example, the Advisory Committee acknowledged that "San Francisco now has many schools that are, racially and ethnically, extremely diverse and, according to the Consent Decree standard, outwardly desegregated."²⁸² This was not satisfactory to the Committee because there was still considerable division within schools, programs and classes along racial and ethnic lines. However, the Advisory Committee did not attribute the situation to *de jure* segregation; rather, it was "clearly a product of disparities in language skills among groups of students."²⁸³ The Committee, dissatisfied with the results under the *Lau v. Nichols*²⁸⁴ consent decree, noted that the school district had not done enough to provide educational opportunities to children lacking the English skills necessary to participate in them.²⁸⁵ As work under the SFNAACP consent decree eliminated weak schools, thereby increasing expectations and pressure for achievement, "the very linguistic diversity that should be one of the district's most powerful assets, continues instead to pose a formidable barrier to fulfillment of the Consent Decree's goals."²⁸⁶

Thus, as the Advisory Committee encouraged and praised the court in its expansion of the Consent Decree's portfolio, it was possible to read the report in several ways. On the one hand, as a report of consultants requested to provide expert advice to officials of the school district facing a variety of challenging problems, it contained a lot of useful information and suggestions for focused attention in the future. However, as the Committee expanded its horizons to reflect the interests of its members and their constituents,²⁸⁷ it provided substantial encouragement to the

Report of Professor Stephan Thernstrom at 13, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 9, 1999) (No. C-94-2418-WHO) (stating that after a 16-year implementation, the consent decree's expenditure of hundreds of millions of dollars have "manifestly failed to accomplish its aim of leveling the playing field by narrowing the racial and ethnic gap in educational achievement"); Julian Guthrie, *Decree Did Not Help SF Black Kids*, S.F. EXAMINER, Feb. 21, 1999, at D1 (despite expenditures over 15 years, the decree "failed in its first and most fundamental goal: getting black children to do well in school.").

282. 1999 Advisory Committee Report, *supra* note 272, at 122.

283. *Id.*

284. 412 U.S. 938 (1973).

285. This group constitutes a substantial number of students in the district. The committee reported that half of the students entering the SFUSD come from homes where the primary language spoken is not English and 30% of all students in the school district are classified as LEP. See 1999 Advisory Committee Report, *supra* note 272, at 124.

286. *Id.* at 123.

287. For example, the Committee suggested the school district focus again on obtaining integrated, and affordable, housing. See *id.* at 156-58. While the cost of housing is undoubtedly a socially and politically important issue in one of the most expensive markets in the country, it is unclear how it could justify continued federal court supervision of the school district until the goals of integrated and affordable housing were addressed by the governmental agencies charged with that responsibility.

court to allow the consent decree to become increasingly unmoored from any plausible legal justification for federal court intervention.

3. *The Parties' Expert Reports*

The SFNAACP and the state superintendent filed a number of expert reports.²⁸⁸ The SFNAACP filed reports from four members of the Consent Decree Advisory Committee to support its position that the student assignment system embodied in paragraph 13 was constitutional and still necessary.²⁸⁹ These brief reports in turn purported to rely primarily on the 1999 Advisory Committee report.²⁹⁰ All of these experts stated as their opinion, in identical or nearly identical language that: vestiges of racial discrimination remained unremedied, thus justifying continuation of the racial classification system; that the Consent Decree addressed those unmet areas of educational inequality; and that the classification system was needed to effectively and fully implement the school desegregation plan.

These reports made no effort to prove the existence of vestiges of segregation.²⁹¹ For example, the reports noted that "a disproportionate number of African American and Latino students receiv[e] D, F and incomplete grades. They also show very high absenteeism."²⁹² However, the expert reports did not link these—or any other—facts to discriminatory policies of the school district in either the past or present. At most, the reports asserted that since certain facts existed in 1983 and still existed at

288. The SFUSD filed only one expert report. The expert would have testified that race is a social construct. *See* Local School District Defendants' Designation of Expert Witness Under Federal Rule of Civil Procedure 26(a)(2), *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Jan. 19, 1999) (No. C-94-2418-WHO). After the court struck the expert's report, along with a number of other experts' reports, for failure to comply with Rule 26(a)(2)(B), the SFUSD chose not to submit any further expert reports. *See* Order at 5, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 28, 1999) (No. C-94-2418-WHO).

289. *See* Revised Expert Witness Statement of Dr. Gary Orfield, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO) [hereinafter Orfield Statement]; Revised Expert Witness Statement of Robert L. Green, Ph.D., *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO) [hereinafter Green Statement]; Revised Expert Witness Statement of Dr. J. David Ramirez, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO) [hereinafter Ramirez Statement]; and Revised Expert Witness Statement of Mr. Hoover Liddell, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO) [hereinafter Liddell Statement].

290. Each expert report also asserted that the author had reviewed the special master's report filed in December 1998. No report made any reference to any specific matter in the special master's report, which was simply a summary of the items in the court record in the SFNAACP case up to the 1983 settlement. *See* Plaintiffs' Expedited Motion to Exclude or Limit Expert Testimony of Drs. Biegel, Green, Orfield, Ramirez, and Liddell at 2, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 9, 1999) (No. C-94-2418-WHO) [hereinafter Plaintiffs' Expedited Motion].

291. The court later noted that after striking some reports as "too conclusory . . . the remaining expert reports contained minimal testimony attempting to link current problems in the SFUSD to acts of racial discrimination by the government prior to 1983." *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1030 (N.D. Cal. 1999).

292. Ramirez Statement, *supra* note 289, at 7; Orfield Statement, *supra* note 289, at 7.

the present time, they must be vestiges of segregation.²⁹³ The reports also asserted—without any backup data or reference to specific studies—that matters would get worse if the racial classification scheme embodied in paragraph 13 were eliminated.²⁹⁴

The SFNAACP also proposed to offer the testimony of Paul Lawrence, the former state monitor. His testimony was to focus on the school district's compliance with the consent decree, as reflected in his state monitoring reports. He also was prepared to testify that paragraph 13 was "essential to carrying out the task" of the consent decree.²⁹⁵ Finally, the SFNAACP offered a statement from Henry Der.²⁹⁶ Der took the position that Chinese students were not disproportionately hurt by the quotas imposed by the consent decree.²⁹⁷

The state superintendent filed two expert reports that were consistent with her position that the decree needed modification because it was no longer narrowly tailored to address any lingering vestiges of segregation. The report filed by Stuart Biegel, the state monitor, focused on what he asserted was one lingering vestige of segregation, "differing expectations depending on a student's race and socioeconomic status."²⁹⁸ However, Biegel was also prepared to testify that a modified student assignment plan based "primarily, if not entirely, on factors other than race" could

293. See, e.g., Green Statement, *supra* note 289, at 6–7.

294. See, e.g., *id.* at 9.

295. Expert Witness Statement of Dr. Paul Lawrence, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Jan. 19, 1999) (No. C-94-2418-WHO).

296. See Revised Expert Witness Statement of Mr. Henry Der, Deputy Deputy [sic] State Superintendent of Public Instruction, Education Equity, Access and Support Branch, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO). Most of Der's statement related to his work as the former director of Chinese for Affirmative Action.

297. See *id.* at 4.

298. Expert Report of Stuart Biegel at 5, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Jan., 1999) (No. C-94-2418-WHO) [hereinafter Biegel Report]. The 1999 Monitor's Report, prepared and filed by Professor Biegel a few months later, also asserts that "low expectations are vestiges of segregation that have not been eliminated to the extent practicable." 1999 Monitor's Report, *supra* note 255, at 37. The existence of lowered expectations consists primarily of anecdotal statements that certain schools used a "watered-down" curriculum. *Id.* at 38–39. The 1999 Monitor's Report does note that some believe that these practices are not discriminatory and are needed to meet the needs of different students' level of achievement. See *id.* at 39.

The assertion, made in both of Biegel's documents, that low expectations are actually a "vestige of segregation" rather than a product of the learning needs of the students, is based upon work of questionable validity for this purpose. Neither of Professor Biegel's filings explained how a trait observed in a 1972 study in some teachers in the school district was still present in the district as a result of official policy or whether any of those teachers were still in district classrooms more than 25 years later. Moreover, Biegel did not mention that the same study also found that "San Francisco teachers were average or above in their attitude toward cultural pluralism, multi-ethnic programming [and] . . . desegregation." Plaintiffs' Expedited Motion, *supra* note 290, at 3 (quoting from 1972 study). The Third Circuit had previously found the work of a second researcher Biegel relied upon to be "devoid of factual support" and "merely conclusory." *Id.* at 3–4 (quoting from *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 765–66 n.16 (3d Cir. 1996)).

allow the district to address "the removal of the vestiges . . . to the extent practicable."²⁹⁹

The state superintendent's second report was prepared by David Ely, director of research for a consulting and database management firm. After conducting a statistical analysis based upon school district and 1990 Census data, Ely concluded: (a) San Francisco's significant residential segregation is "related to socio-economic characteristics and academic performance;" (b) "[i]t should be possible to devise a scheme" that would "assure reasonable socioeconomic diversity at each school . . . [which] would not result in the ethnic resegregation of schools;" but (c) since the system "would not guarantee ethnic diversity," the process needed careful monitoring.³⁰⁰

The *Ho* plaintiffs filed reports of three experts in rebuttal.³⁰¹ Herbert J. Walberg³⁰² rebutted Robert Green's opinion that there were vestiges of past racial discrimination. Walberg noted that Green had not provided supporting documentation for his opinion.³⁰³ In Walberg's view, the disparate levels of minority achievement observed in the school district were attributable to socioeconomic status and other factors related to poverty, rather than acts of discrimination by school officials.³⁰⁴

David J. Armor³⁰⁵ rebutted Robert Green and Gary Orfield's reports concerning the alleged existence of vestiges. Armor pointed out the lack of supporting data or analyses to link the supposed vestiges to any past

299. Biegel Report, *supra* note 298, at 11.

300. Corrected Expert Report of David Ely, attached to Errata of Defendant Superintendent of Public Instruction's Expert Report, at 10-11, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Jan. 19, 1999) (No. C-94-2418-WHO).

301. The *Ho* plaintiffs also filed a motion to exclude the testimony of several experts, primarily on the ground that these experts "opine that vestiges of segregation exist, but fail to identify the data on which their opinions are based or the methodologies employed to establish a causal link between those present day 'vestiges' and identified acts of prior *de jure* segregation." Plaintiff's Expedited Motion, *supra* note 290, at 1. The court struck several of the reports. See Order, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Feb. 11, 1999) (No. C-94-2418-WHO).

302. Walberg, professor of education and psychology at the University of Illinois at Chicago, has testified as an expert in six major school desegregation cases, including Cleveland, Wilmington, Topeka, DeKalb County, Georgia, Oklahoma City, and Kansas City. See Plaintiffs' Rebuttal Expert Witness Report of Professor Herbert J. Walberg, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 9, 1999) (No. C-94-2418-WHO).

303. Walberg noted that the district court in the Cleveland case had found Green's report in that case to be of "suspect weight," for similar failings. *Id.* at 7.

304. See *id.* at 2. Walberg relied on his own research, as well as a doctoral dissertation that studied over 2800 kindergarten children in the SFUSD and reached the same conclusion. See *id.* at 8-12 (discussing James Green, *Is There Inequality of Educational Opportunity? A New Look Using Longitudinal Data and a Hierarchical Model* (University of California Berkeley Doctoral Dissertation, 1995) (on file with author)).

305. Armor is professor of public policy at George Mason University. He has testified in several school desegregation cases, including Pasadena, DeKalb County, and Kansas City. His research is summarized in his book, *Forced Justice: School Desegregation and the Law* (1995). See Plaintiffs' Rebuttal Expert Report of Professor David J. Armor, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 9, 1999) (No. C-94-2418-WHO) [hereinafter Armor Report].

or present instances of discriminatory practices or policies of the school district.³⁰⁶

Stephan Thernstrom rebutted the reports of Orfield, Green, and Ramirez in the greatest detail.³⁰⁷ He noted that neither Orfield's expert report, nor the Consent Decree Advisory Committee's report, which Orfield appended to his report, made the links between acts of discrimination and present conditions.³⁰⁸ Thernstrom also observed that in order to explain the disparities in rates of Advanced Placement exam takers in the school district as a "vestige," which Orfield contended led to classroom segregation, one would have to assume that the school district simultaneously discriminated against black, Hispanic, and American Indian students, acted impartially toward non-Hispanic whites and discriminated in favor of Asian Americans.³⁰⁹

Thernstrom noted, and gave many examples, where Green had not followed the "elementary tenet of social sciences that we cannot make inferences about the causes of statistical disparities without systematically examining a wide variety of possible explanations."³¹⁰ In each instance, Thernstrom provided possible explanations that were not based on an assumption of a discriminatory policy by the school district.³¹¹ With respect to Ramirez's report, Thernstrom noted that it was a nearly verbatim

306. See Armor Report, *supra* note 305, at 3–6.

307. See Plaintiffs' Rebuttal Expert Witness Report of Professor Stephan Thernstrom, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 9, 1999) (No. C-94-2418-WHO) [hereinafter Thernstrom Report]. Thernstrom, professor of history at Harvard University, has studied racial and ethnic differences for many years. He has recently published *America in Black and White: One Nation, Indivisible* (1997) with his wife, Abigail Thernstrom. He has testified in many school cases, including Boston and Houston.

308. See Thernstrom Report, *supra* note 307, at 6. Thernstrom noted that bilingual education programs were likely to be the most important source of any "segregation" Orfield found. See *id.* at 8.

309. See *id.* at 10. Thernstrom noted that one would have to assume the existence of the same unlikely sort of continuum of bias with respect to suspensions, with the exception that the school district was not selecting Latinos disproportionately for discipline. See *id.* at 20–21. Similarly, to explain the data regarding placement in special education in terms of discrimination, one would have to assume that the teachers and administrators in the school district were more biased against whites than either Latinos or American Indians. See *id.* at 23.

310. *Id.* at 14. Thernstrom noted, for example, that the low achievement figures that Green pointed to as evidence of vestiges of segregation were entirely consistent with national data. See *id.* at 15. He also noted that the poor attendance record of black students in middle and high schools was much below that of other groups, but that Green did not explain how that was the result of school policy. See *id.* at 18.

311. For example, Thernstrom observed that it was quite possible that disparities in rates of discipline were not related to a continuum of discrimination on the part of the teachers and administrators in the school district, but were the result of differential behavior on the part of the students. One possibility for the different rates, he asserted, is that the students from different groups were more or less likely to come from single-parent families, which in turn is associated with difficulties in adjustment at school. See *id.* at 21 (citing research); see also Tamar Lewin, *Study Finds Racial Bias in Public Schools*, N.Y. TIMES, Mar. 1, 2000, at A14 (studying racial disparities in eleven cities, including San Francisco).

copy of much of Orfield's report.³¹² In sum, according to Thernstrom: "The argument would have to be that today's teachers, administrators, or educational practices are subtly tainted by bias that has roots in the past. These expert witnesses assume this to be the case; they do very little to demonstrate it."³¹³

Thus, after reviewing the reports of the experts, the *Ho* plaintiffs felt that, one week prior to trial, the school district had failed to provide the requisite evidence to demonstrate the continuing necessity of the decree because it had not offered even one expert of its own.³¹⁴ The SFNAACP, which had taken on the burden instead, had very little evidence to present that would even arguably make the required linkages demonstrating the existence of vestiges.³¹⁵ The expert reports of another defendant, the state superintendent, buttressed the plaintiffs' case in large part because they agreed that the consent decree was not narrowly tailored.³¹⁶ However, it continued to be the assumption of the plaintiffs' lawyers that the court would do its best to make the linkages, if at all possible, in order to keep as much of the consent decree alive as possible.

D. Achieving a Settlement

1. Settlement Discussions Begin and Falter

While the parties had been pursuing their positions with vigor in court through motions and discovery practice, they also engaged in settlement discussions in fits and starts. No discussions took place near the commencement of the *Ho* action in 1994. The first settlement discussions, in late 1995, faltered quickly; the parties' views of the legal burden were just too disparate at that point to get anywhere. Some of the legal issues needed to be resolved before the parties could really engage in meaningful discussions. Before the Ninth Circuit ruled in June 1998, the attorneys for the defendants seemed to believe that Judge Orrick would protect the consent decree from the challenge posed by the *Ho* plaintiffs by disposing of the case at an opportune time. Thus, the defendants acted as if they believed there was no point in settling with the *Ho* plaintiffs; delaying and

312. Thernstrom said he found this "bizarre," and asked if there was some "convention in legal proceeding that I am unaware of." *Id.* at 26. He also inquired, who is the father of these "nearly identical twins?" *Id.* at 27.

313. *Id.* at 27.

314. *Cf. Ho*, 147 F.3d at 865 (placing burden on school district).

315. Moreover, what little evidence the SFNAACP had adduced showed that the consent decree provided a constitutional remedy to—at most—African American and Latino students. Thus, the *Ho* plaintiffs filed a motion to redefine the classes in the SFNAACP and *Ho* cases appropriately. See *Ho* Plaintiffs' Motion to Redefine Classes to Reflect Class Representatives' Position, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Feb. 4, 1999) (No. C-78-1445-WHO).

316. See Joint Pretrial Conference Statement, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Aug. 21, 1998) (No. C-94-2418-WHO) [hereinafter Joint Pretrial Conference Statement]. Thus, there was no need for the *Ho* plaintiffs to provide expert reports to rebut either Ely or Biegel. The *Ho* plaintiffs did not rebut Der's report because his assertion that the Chinese students were not disproportionately harmed by the consent decree (even if true by some measures) was not germane to the issues for trial the Ninth Circuit had framed. At most, Der's opinion reached a minor point with respect to whether the assignment plan was narrowly tailored.

waiting for Judge Orrick to act in their favor was a better strategy from their vantage point.

If this was indeed the strategy, it began to fall apart in the latter half of 1997. The key event was a decision on the part of then-Governor Pete Wilson to take action in the case. The Governor, a Republican, "asked" the politically appointed state board of education to change sides in the *Ho* case and support the position of the plaintiffs,³¹⁷ which the board did a few weeks later.³¹⁸ Given the governor's strident stands against affirmative action at the University of California and in the state generally through his advocacy for Proposition 209,³¹⁹ it was not too surprising that he requested the state board to change sides. It was only a bit of a mystery why he had not taken action earlier in the *Ho* case. It is possible that he or a member of his staff learned of testimony the mother of one of the named plaintiffs in *Ho* provided in Congress at the behest of Senator Orrin Hatch, Chair of the Senate Judiciary Committee.³²⁰ Her tearful and dramatic testimony was covered on the PBS show *The News Hour with Jim Lehrer*.³²¹ Given the timing of Governor Wilson's action, it seems possible that either someone on the Governor's staff saw the news coverage or else someone on Senator Hatch's staff alerted a counterpart in Sacramento.

The Governor's "request" led to a division in the representation of the state defendants. Until Governor Wilson initiated a change, all the state defendants had been represented by one attorney in the state department of education, who stood shoulder to shoulder with the school district and SFNAACP attorneys as they all tried to repulse the *Ho* challenge. The state board of education ultimately ended up being represented by a Los Angeles attorney³²² with ties to the Washington, D.C.-based Center for Individual Rights,³²³ a group that has initiated many suits challenging affirmative action, including *Hopwood v. Texas*³²⁴ and the challenge to admissions policies at the University of Michigan.³²⁵ Since switching sides, however, the state board of education has not taken an active role in the

317. See Letter from Pete Wilson, Governor of California, to Yvonne W. Larsen, President State Board of Education (Aug. 20, 1997).

318. See Ruling on Matter at 1, California St. Bd. of Educ. v. Eastin, No. 97CS02991 (N.D. Cal. June 29, 1998) [hereinafter Ruling on Matter].

319. See LYDIA CHAVEZ, *THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION* 39-76 (1998) (detailing Governor Wilson's role in both matters in a chapter entitled "Hitting a Nerve"); see also NICHOLAS LEMANN, *THE BIG TEST* (1999) (discussing politics behind Proposition 209).

320. See *Quotas in San Francisco: Hearings on Affirmative Action Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997) (testimony of Charlene F. Loen, mother of Patrick Wong).

321. PBS television broadcast, June 16, 1997.

322. The state board went through several changes in representation in 1997-98. For purposes of the appeal before the Ninth Circuit, they were represented by Professor John Yoo of the University of California, Berkeley. Two other lawyers made appearances in the district court before the current lawyer, Patrick Manshart, was retained.

323. See generally Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1028-34 (1998) (discussing litigation strategy of CIR).

324. 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

325. See *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

litigation. In essence, it has entered a confession of judgment and has been sitting on the sidelines ever since.³²⁶

The other new lawyers in the case were not so supine. The State Superintendent of Public Instruction, Delaine Eastin, a Democrat and a state-elected official in her own right, did not agree with the Republican Governor's stance on the *Ho* case. She turned to the San Francisco firm of Remcho, Johansen & Purcell³²⁷ for separate legal representation.³²⁸ Two senior partners, Joseph Remcho and Robin Johansen, took a fresh look at the situation when they entered the case. As they came into the case just in time to file briefs in the Ninth Circuit on the appeal from the denial of summary judgment, they did not take an independent stance before that court.³²⁹ They also took steps to explore the possibilities of settlement by calling upon the lawyers for each party to get acquainted and to broach settlement. Their legal position migrated to one more in the center of the parties. Their position became that the decree was still needed, but that it was no longer narrowly tailored.³³⁰ While still clearly leaning toward the other defendants due to their belief that the decree could be justified if it were modified, the state superintendent's lawyers were sufficiently in the center that they began in the summer of 1998 to serve as go-betweens in settlement discussions.

The broad outlines of a possible settlement emerged from those discussions. In brief, it looked as if a settlement could be reached with three main components. First, the parties understood that the *Ho* plaintiffs were adamant in their desire to eliminate the racial classification scheme and the quotas on enrollment by racial and ethnic groups. Second, the parties seemed to be in agreement that after fifteen years of implementation and the substantial state funding, it was possible to imagine the consent decree's termination within the foreseeable future, and the return of the school system to local control. We called this concept the "sunset" provision. Third, the SFNAACP and, to an equally strong degree, the school

326. See Memorandum Decision and Order at 7, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 19, 2000) (No. C-78-1445-WHO).

327. The Remcho firm is well connected in Democratic politics in California. See, e.g., Paul Elias, *Putting S.F. Schools to the Test: Racial Quotas Case Stirs Up Judge, Educators, Affirmative Action Advocates*, S.F. RECORDER, Jan. 14, 1999, at 1 (calling the firm the favorite of Democrats). The firm's Martindale-Hubbell listing includes the California Legislature as a representative client.

328. There was also a skirmish between the state board and the superintendent as to who would control the legal position of the state department of education. Essentially, the department is now neutral in the litigation, although its position is nominally controlled by the state superintendent as a matter of specific executive judgment, which a state trial court has held is properly within her purview. See *Ruling on Matter*, *supra* note 318, at 5; see also Paul Elias, *Putting S.F. Schools to the Test: Racial Quotas Case Stirs Up Judge, Educators, Affirmative Action Advocates*, S.F. RECORDER, Jan. 14, 1999, at 1 (noting that at one point the department filed briefs on both sides of the *Ho* case).

329. The State Superintendent merely joined in the Joint Opposition Brief filed by the SFUSD and the SFNAACP. See State Superintendent of Public Instruction's Joinder in Joint Opposition Brief, *Ho v. San Francisco Unified Sch. Dist.*, (9th Cir. filed Oct. 28, 1997). The State Department of Education took no position in the Ninth Circuit. See Letter from Robin B. Johansen to Cathy A. Catterson, Clerk of Ninth Circuit (Oct. 28, 1997).

330. See, e.g., Joint Pretrial Conference Statement, *supra* note 316.

district wanted to avoid racial isolation and the return of any racially identifiable schools. This concern became known as the "safety net."

Although, after much discussion, the lawyers agreed on these basic principles in the summer of 1998, as is often said, the devil is in the details. It proved to be very difficult to reach agreement on those details. Although I will not discuss the extensive confidential negotiations, it is possible to glimpse the state of the negotiations through the public portion of one set of events. As discussed earlier,³³¹ Judge Orrick appointed a special master to attempt to mediate a settlement in September 1998. These efforts ended in mid-September without an agreement, but something emerged shortly after that process ended.

On October 15, 1998, the school district, the state superintendent, and the SFNAACP tried an end-run around the *Ho* plaintiffs.³³² These three parties filed a Stipulation Regarding Modification of the Consent Decree in the *SFNAACP* case.³³³ In this stipulation, the three defendants proposed a series of modifications to the consent decree, including:

(1) No later than the 2000-2001 school year, students would be assigned to schools "on the basis of geographic distribution, residence, socio-economic status, Optional Enrollment Requests, and with significant numbers of no less than six racial/ethnic groups." The SFUSD was to "implement ways to avoid racial/ethnic isolation, identifiability, and/or resegregation."³³⁴

(2) The parties to the stipulation acknowledged "that SFUSD officials have the duty and authority to determine criteria for admission to all schools. The parties further acknowledged that, in setting those criteria, District officials may consider many factors, including the desire to promote racial, residential, geographic and ethnic diversity in all district schools. However, race or ethnicity shall not be the sole consideration in determining such admission criteria."³³⁵

(3) Assignments to schools were to use a zone system to reflect student geographic, racial and socio-economic distributions in the district, but the exact mechanisms for achieving these goals were not specified in the stipulation.

(4) The parties to the stipulation agreed to consider which paragraphs of the decree could be dismissed, "guided by the extent each provision can be eliminated without the potential for adverse impact upon the ability of the school district to eliminate dispari-

331. See text accompanying *supra* notes 201-202.

332. The state board did not participate.

333. Stipulation Regarding Modification of the Consent Decree, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Oct. 15, 1998) (No. C-78-1445-WHO). This stipulation was filed shortly before the defendants responded to the *Ho* plaintiffs' motion for a preliminary injunction, and was used by the defendants to support their contention that the preliminary injunction was unwarranted.

334. *Id.*

335. *Id.* at 2.

ties in academic achievement, referrals to special education, suspensions, expulsions, and other discipline, and the ability to serve English learners effectively, and any other area of public school education where the data relating to the SFUSD deviates from the norms established as a result of the examination of data related to all California public schools as published by the California Department of Education."³³⁶

(5) "[T]hrough the celebration of the 50th Anniversary of *Brown v. Board of Education I* in 2004, the parties shall implement the remaining provisions of the Consent Decree. On or after May 17, 2003, a hearing shall be held by the Court to determine whether sufficient progress has been made in implementing the Consent Decree to warrant the declaration of unitary status. The Consent Decree shall be dismissed automatically upon a declaration of unitary status, but no later than the end of the school year in which the 50th Anniversary of *Brown v. Board of Education II* is celebrated, unless the SFNAACP presents evidence of specific acts of racial discrimination and/or segregation which have occurred during or after the 2001-2002 school year."³³⁷

Since this stipulation would obviously affect the *Ho* case, the court notified the *Ho* plaintiffs of the proposed modifications and set the matter for hearing along with previously scheduled matters in the *Ho* case. The court specifically directed the parties to be prepared to address the need for the modifications, whether the proposals "comply with the requirements of the United States Constitution, and the effects of the proposed modifications on the *Ho* case."³³⁸

The court refused to give the plan even preliminary approval after a brief hearing. In its order, the court noted that the plan was filed shortly after the *Ho* plaintiffs had filed for a preliminary injunction seeking an order enjoining further implementation of paragraph 13. The court held that the moving parties had "made no effort" to meet the burden of showing a significant change of circumstances warranting revision of the decree, as required by *Rufo v. Inmates of the Suffolk County Jail*.³³⁹ In the

336. *Id.* at 3.

337. *Id.* at 3-4.

338. Order at 2, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Oct. 20, 1998) (No. C-78-1445-WHO). The defendants immediately objected because the court had included the *Ho* plaintiffs in the hearing. Their position was that the *Ho* plaintiffs had no role to play in the preliminary approval of the proposed modifications to the Consent Decree, and could be heard only at a final approval hearing. See SFNAACP, SFUSD, and State Superintendent's Opposition to *Ho* Plaintiffs' Ex Parte Request to Consolidate Hearings and Request for Reconsideration, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Oct. 26, 1998) (No. C-94-2418-WHO). The court overruled the objection.

339. Memorandum Decision and Order at 3, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 2, 1998) (No. C-78-1445-WHO) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). For discussion of *Rufo*, see David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239 (1993).

court's view, the proposed modifications were "vague and incomplete."³⁴⁰ Any proposed modification of the decree required specific language with specific guidelines for the assignment of students to schools. In addition, the court noted that the proposal retained a race-based assignment system with six groups to be represented in "significant numbers"³⁴¹ at each school. The parties to the stipulation did not even attempt to meet the burden of showing that the proposed system met strict scrutiny.

This brusque rejection seemed to cool the stipulating parties' ardor for trying to make an end-run around the *Ho* plaintiffs' claims.³⁴² After the court issued its order in December 1998, there was no further mention of settlement until the school district and the SFNAACP made an offer of judgment.³⁴³ The insubstantial offer was ignored; coming on the last possible day permitted under Rule 68 of the Federal Rules of Civil Procedure, the offer seemed to be nothing but an attempt to try to set up a later denial of a substantial portion of any award of attorneys' fees.³⁴⁴

2. Reaching a Settlement

The settlement process was not renewed in earnest until the day of the final pre-trial conference in February 1999. As all the lawyers were walking out of the courtroom, contemplating the next six days of preparation

340. Memorandum Decision and Order at 4, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 2, 1998) (No. C-78-1445-WHO) (citing and quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

341. *Id.* At the hearing, the court indicated that a sunset date of 2005 was too far away. The court did not warm to the idea of tying the termination of the decree to the celebration of *Brown v. Board of Education I and II*. In the papers in opposition to the proposed modifications, the *Ho* plaintiffs contended that suggesting that the court keep the decree in place until its dissolution could be used to mark *Brown's* golden jubilee showed that the stipulating parties did not think that the decree had a remedial purpose. The *Ho* plaintiffs suggested, "The Court might find termination of the Consent Decree on the twentieth anniversary of the filing of the [SFNAACP] case [i.e., 1998] an equally appealing, and surely more relevant, alternative." *Ho* Plaintiffs' Briefing of Issues Pursuant to Order Filed October 20, 1998, at 2 n.2, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Nov. 11, 1998) (No. C-78-1445-WHO).

342. The *Ho* plaintiffs used the event of the proposed modifications as a basis for seeking formal intervention for limited purposes in the SFNAACP case. See Order, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 14, 1999) (No. C-78-1445-WHO) (granting intervention for purposes of participating in, and/or challenging any future modifications to the student assignment plan). The *Ho* plaintiffs had not done so previously because it seemed wise strategically to stay one step removed from the SFNAACP case and any snare of taking on an unwelcome burden of proof. The *Ho* plaintiffs were also concerned about a case the Supreme Court had then-recently accepted for review. See *Felzen v. Andreas*, 134 F.3d 873 (7th Cir.) (requiring class member to intervene formally in order to have standing to appeal from any rulings in that action), *cert. granted*, 524 U.S. 980 (1998). Subsequent to the district court's decision granting the *Ho* plaintiffs' motion to intervene in SFNAACP, the Supreme Court affirmed the Seventh Circuit by an equally divided court. See *Cal PERS v. Felzen*, 525 U.S. 315 (1999).

343. See Letter from Thomas I. Atkins and Aubrey V. McCutcheon, Jr. to Daniel C. Girard (February 5, 1999) (conveying Offer of Judgment pursuant to Fed. R. Civ. P. 68).

344. See *Marek v. Chesny*, 473 U.S. 1 (1985) (holding that where the underlying fee statute defined "costs" as including attorneys' fees, such fees were to be included as "costs" for purposes of Rule 68).

for the looming trial date, Robin Johansen, the state superintendent's attorney, asked about the possibility of trying once more to settle. Each party assigned one person to explore settlement.³⁴⁵ I was the person designated for the *Ho* plaintiffs, while the Girard & Green lawyers headed back to the bunkers to finish preparing for trial.³⁴⁶ The negotiations took place over the President's Day weekend. The parties made progress, but could not reach agreement on all points.

I walked into Judge Orrick's courtroom on February 16, 1999, expecting to hear opening statements. However, as I entered the courtroom packed with spectators, a defense attorney proposed an alternative formulation for what had been the sticking point the night before. The lawyers caucused in the hallways, out of sight of the numerous reporters and other spectators, and decided on the final points perhaps an hour after the trial was scheduled to start.³⁴⁷

Judge Orrick gave us only a brief time to explain the settlement privately to the clients and supporters who were in the courtroom.³⁴⁸ The attorneys then announced to a frustrated and curious public and press that the trial would not be starting,³⁴⁹ but that the terms of the settlement would be announced the next day.³⁵⁰ When we returned to court, Judge Orrick announced the terms of the settlement and scheduled the fairness hearing for April 1999.³⁵¹ We then headed for another press conference,³⁵² where we proclaimed that this was a great day for San Francisco.

While the terms of the settlement were fairly detailed, they followed the basic outlines of the settlement principles we had identified several months before. In brief, they were:

345. Robin Johansen, and her firm's associate, Tom Willis, served as settlement liasons for the state superintendent. Michael Harris took responsibility for the SFNAACP. These lawyers also communicated with counsel for the SFUSD, as needed.

346. My negotiating position was strongly enhanced by the knowledge that the experienced Girard & Green trial team was toiling away. In addition to the fine work of Daniel Girard and Anthony Lee, Robert Crowe, a former Assistant United States Attorney and a veteran of 40 jury trials, prepared cross-examination of witnesses. Gordon Fauth drafted many excellent briefs in the case and contributed important suggestions to trial and settlement strategy.

347. Those moments seemed like the first scene in the movie of *A Civil Action*, where John Travolta, playing Jan Schlichtmann, is about to give his opening statement, but instead settles the case via passed notes and gestures from the defense counsel.

348. See *San Francisco NAACP*, 59 F. Supp. 2d at 1025.

349. The court wanted an opportunity to review the terms of the proposed settlement overnight. See *id.* at 1025.

350. See Nanette Asimov, *Ethnic Quotas in S.F. Public Schools to End*, S.F. CHRON., Feb. 17, 1999, at A1. One spokesperson for the *Ho* plaintiffs happily noted the coincidence that the case settled on the Chinese New Year. See Mary Curtius, *Schools Drop Race Factor in Admissions*, L.A. TIMES, Feb. 18, 1999, at A3.

351. The full text of the settlement appears at 59 F. Supp. 2d at 1025-27.

352. Looking out over the large number of reporters and camera crews at the two major press conferences on successive days, I remember taking note of the racial, ethnic, and gender diversity of the press covering the story, as well as of the attorneys in the case. The diversity on both sides of the cameras seemed to be just one more piece of evidence that court-mandated quotas—the strongest form of affirmative action—certainly were not needed in San Francisco to maintain the healthy diversity we enjoy here.

(1) The Consent Decree would terminate no later than December 31, 2002, subject to court approval. Any party could move for unitary status prior to that date. The reason for selecting that date was: "The parties anticipate that no later than such time, the state and local governmental defendants will have taken all reasonably practical measures to remedy any vestiges of segregation."³⁵³

(2) The SFUSD and the state superintendent were to develop a new student assignment plan for the 2000-01 school year, with the Ho plaintiffs and the SFNAACP having the right to review and comment on the proposal. If the parties could not agree by October 1, 1999, any party could seek approval of its own plan through a motion to modify.³⁵⁴

(3) "The parties acknowledge that SFUSD officials have the duty and authority to determine lawful criteria for admission to all schools in the SFUSD. The parties further acknowledge that in setting those criteria, state and federal law provide that district officials may consider many factors, including the desire to promote residential, geographic, economic, racial and ethnic diversity in all SFUSD schools. However, race or ethnicity may not be the primary or predominant consideration in determining such admissions criteria.³⁵⁵ Further, the SFUSD will not assign or admit any student to a particular school, class or program on the basis of race or ethnicity of that student, except as related to the language needs of the student or otherwise to assure compliance with controlling federal or state law."³⁵⁶

(4) The decree would be modified to provide that the SFUSD "may request, but not require, that parents and/or students identify themselves by race or ethnicity at the time of actual enrollment." Any request for racial or ethnic data would be optional, and would contain a "decline to state" provision. Any such request had to clearly provide that self-identification was optional,

353. *San Francisco NAACP*, 59 F. Supp. 2d at 1025 (¶ A); cf. *Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (discussing "whether the vestiges of past discrimination had been eliminated to the extent practicable").

354. See *San Francisco NAACP*, 59 F. Supp. 2d at 1025-26 (¶¶ B & E); cf. Memorandum Decision and Order at 3, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 2, 1998) (No. C-78-1445-WHO) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)).

355. Cf. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (holding that facially neutral activity such as drawing electoral district lines is improper if race is the predominant consideration) (internal citation added); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (stating that "the constitutional wrong occurs when race becomes the 'dominant and controlling' consideration"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (discussing what is permissible in drawing voting district lines); see also Memorandum Decision and Order at 24, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 19, 2000) (No. C-78-1445-WHO) ("When a plan is facially race neutral, the Court has to look at the government's motivation in developing the plan in order to determine whether strict scrutiny is required.") (citation omitted).

356. *San Francisco NAACP*, 59 F. Supp. 2d at 1025 (¶ C).

and there would be no adverse consequences for refusing to self-identify.³⁵⁷

(5) The parties acknowledged that notwithstanding the new plan, it was possible "that there may be identifiable racial or ethnic concentration at a particular school or schools that will adversely affect the SFUSD's educational goals or programs in that school or schools." The parties agreed to discuss the matter once data were made available in October 2000 and 2001. If the parties could not agree, even with the assistance of the state monitor, any party could seek court approval of its own proposals through a motion to modify the consent decree.³⁵⁸

(6) The parties agreed to the entry of a preliminary injunction, which would remove the racial/ethnic guidelines immediately, and would govern assignment of students beginning with the 1999-2000 school year. "The preliminary injunction shall provide that the SFUSD will not assign or admit any student to a particular school, class or program on the basis of the race or ethnicity of that student, except as related to the language needs of the student or otherwise to assure compliance with controlling federal or state law."³⁵⁹

(7) The SFNAACP and the Ho plaintiffs promised not to allege violations of the fourteenth amendment arising from any racial isolation or racial identifiability resulting from implementation of the preliminary injunction.³⁶⁰

357. *Id.* at 1025-26 (¶ D). The Ho plaintiffs sought this provision to assure that requests for data for statistical purposes would be truly optional and would not taint the admissions process in any way. *Cf. Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 862 (9th Cir. 1998) (commenting on the mandatory nature of the identification process then in place under the consent decree).

358. *San Francisco NAACP*, 59 F. Supp. 2d at 1026 (¶ G).

359. *Id.* at 1027 (¶ H). The preliminary injunction was to be consistent with the brief plan the SFUSD had filed with the court pursuant to the order to file a race-neutral plan prior to the commencement of the trial. *See id.* at 1027 n.1. The preliminary injunction was needed because the admissions decisions for the 1999-2000 school year were about to be made within a very short period after the settlement was reached. *See id.* at 1034-35.

360. *See id.* at 1026 (¶ I). The provision was included because the parties understood that removal of the quotas would affect the racial make-up of the incoming kindergarten, sixth and ninth grade classes to an unknown degree at an unknown number of schools in the district. The parties assumed that the school district's new plan would address these changes in a race-neutral manner. *See* 1999 Monitor's Report, *supra* note 255, at 12-13. *But see infra* Part III.E.

The 1999 Monitor's Report documents the resulting changes. For example, kindergartens in ten elementary schools, and sixth grade classes in two middle schools ended up admitting more than 60% of any single race or ethnicity for the fall of 1999. *See* 1999 Monitor's Report, *supra* note 255, at 52-53. At Lowell High School, the number of Chinese American students admitted to the ninth grade increased to 45.6% (up from 39.5% the previous year), while the number of whites admitted also increased (from 23.5% to 26.9%). The number of African Americans dropped from 5.57% to 1.97%, and the number of Latinos dropped from 11.4% to 5.4%. *See id.* at 62.

This was an excellent agreement from the point of view of the *Ho* plaintiffs because it met all of the primary goals of the class.³⁶¹ The *Ho* plaintiffs finally received immediate relief from the racial caps and the minimum quotas of a certain number of groups at any one school. They also obtained the promise that any future assignment plans would be race-neutral. The projected termination or sunset date was much sooner, and was tied to a reason based in law, i.e., that the parties anticipated that the *Dowell* standard would be met by then.³⁶²

The settlement met at least some of the goals of the other parties as well. Everyone acknowledged that the school district and the state superintendent were the parties with institutional responsibility for developing a new plan.³⁶³ The legitimate data collection needs of the school district were met without forcing anyone to undergo mandatory classification by race by permitting data collection at the time of actual enrollment and making sure that parents and children could freely choose not to state their race. The SFNAACP's concerns about avoiding racial isolation were addressed in the acknowledgment that the school district could pursue the goal of diversity—within constitutional limits, and within the limited provision that racial or ethnic concentration “at a particular school or schools that will adversely affect the SFUSD’s educational goals or programs” could be discussed at later dates on the basis of specific data and concrete problems.³⁶⁴

The changes in the entering class at Lowell attracted special attention. See, e.g., Joanna Mareth, *Color-Blind Affirmative Action?*, AM. PROSPECT, Sept.-Oct. 1999, at 58; Julian Guthrie, *Lowell Sees Big Drop in Blacks, Latinos: 50% Fewer will Be Admitted Than in '98*, S.F. EXAMINER, Mar. 16, 1999.

361. The press typically reported the settlement as a victory for the *Ho* plaintiffs. See, e.g., *San Francisco Schools Abolish Racial Quotas*, WASH. POST, Feb. 18, 1999; Paul Elias, *S.F. School Settlement to End Quotas by 2003*, S.F. RECORDER, Feb. 18, 1999 (“co-defendants chose ‘peace with honor’ rather than face defeat at trial. And defeat was certain.”); Julian Guthrie, *What S.F. Gave Up to Settle Race Suit*, S.F. EXAMINER, Feb. 17, 1999, at A1; Laura Pearlman, *A Schoolhouse Rocked*, AM. LAWYER, Apr. 1999, at 130.

362. See *San Francisco NAACP*, 59 F. Supp. 2d at 1035 (discussing tie to legal standards). Moreover, in view of the extensive record before the parties at the time of the settlement, including the then-recent report of the state monitor, the January 1999 report of the Advisory Committee, and the defendants’ expert reports, it should be nearly impossible for the defendants to claim successfully that the termination date should be modified as December 31, 2002 approaches. See *Rufo*, 502 U.S. at 385 (citations omitted):

Ordinarily, however, modification should not be granted where a party relies upon events that at the time it enters into a decree were actually anticipated. If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60 (b).

363. Although the settlement agreement acknowledged the legitimate role of the governmental defendants in generating a new plan, the settlement left the *Ho* plaintiffs with a role in the approval process. There was some reason to believe that Judge Orrick might have written a decision after trial that would have eliminated the ability of the *Ho* plaintiffs to affect the process of defining the alternative to paragraph 13’s student assignment system.

364. *San Francisco NAACP*, 59 F. Supp. 2d at 1026 (¶ G).

3. *The Court Approves the Settlement*

Pursuant to the court's preliminary approval order, the school district provided notice to the overlapping members of the *Ho* and *SFNAACP* classes.³⁶⁵ The fairness hearing was held in April 1999; once again the courtroom was packed with members of the public and the press. Nearly all the people permitted to speak,³⁶⁶ whatever their race or ethnicity, opposed the settlement plan on the grounds that dropping the quotas would undermine their ideas about diversity. After several hours of statements from class members, including many high school students,³⁶⁷ the parties responded. In brief, the parties pointed out that the school district had to abandon the quotas and develop a new system, free from constitutional infirmities. Then Judge Orrick indicated from the bench that he would approve the settlement,³⁶⁸ and the hearing ended.

Over two months later, the court issued its opinion approving the settlement. In its July 1999 opinion, the court considered whether the settlement was fair, reasonable, and adequate by examining a series of factors cited by the Ninth Circuit.³⁶⁹ The first factor was the strength of the plaintiffs' case. The court concluded that "[b]ased on the evidence submitted to the Court before trial, plaintiffs were likely to succeed on their claim that

365. *See id.* at 1028.

366. In response to the motion of the *Ho* plaintiffs, the court allowed only members of the classes, parents of class members and representatives of the groups it had previously recognized as *amicus curiae* to participate in the hearing. Thus, the court struck objections from several people who were not members of either class, including representatives of the Coalition to Defend Affirmative Action By Any Means Necessary. *See id.* at 1033. The court permitted Chinese for Affirmative Action and Multicultural Education, Training and Advocacy, a Latino organization, to speak. The court also had asked the parties to address themselves particularly to the written objections filed by Gary Orfield. *See Order, San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Apr. 16, 1999) (No. C-78-1445-WHO). On behalf of the *Ho* plaintiffs, Stephan Thernstrom was kind enough to provide a thorough reply to Orfield's report on fairly short notice. His report, dated April 22, 1999, was filed with *Ho* Plaintiffs' Response to Objections of Dr. Gary Orfield to Settlement, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Apr. 23, 1999) (NO. C-78-1445-WHO).

367. While many of these students spoke with an eloquent style, none understood the legal issues enough to be effective. *See, e.g., San Francisco NAACP*, 59 F. Supp. 2d at 1033 (quoting a representative student). The students, who had come at the behest of the Coalition to Defend Affirmative Action By Any Means Necessary, were not always well-versed in courtroom decorum. One student took the microphone out of the holder on the podium, started to pace, and then turned his back on Judge Orrick so that he could address his fellow students sitting among the courtroom observers. Judge Orrick gave the "civilians" a lot of leeway, and did not admonish this behavior. Personal observation of David I. Levine (Apr. 20, 1999). The experience of watching the youthful members of the class state their objections to the settlement nicely illustrated Deborah Rhode's observations about the shortcomings of public testimony by lay class members as a means to assess the fairness of a proposed settlement. *See Deborah L. Rhode, Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

368. *See* Julian Guthrie & Eric Brazil, *Admissions Settlement Finalized for S.F. Schools*, S.F. EXAMINER, Apr. 20, 1999, at A3.

369. *See San Francisco NAACP*, 59 F. Supp. 2d at 1028 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1028 (9th Cir. 1998)).

the race-based student assignment plan is no longer constitutional.”³⁷⁰ The court reviewed the defendants’ difficulty in proving “that any current problems in the SFUSD were caused by governmental discrimination prior to 1983.”³⁷¹ In view of the stringent standards of the Supreme Court’s case law and the Ninth Circuit’s law of the case, the court saw little likelihood that defendants would be able to defend the race-based student assignment plan contained in the consent decree.

Other factors also pointed toward the fairness of the settlement. The time and expense of trial and appeals, quite possibly to the Supreme Court, and the potential divisiveness of the litigation all suggested that settlement was preferable. The court noted that there was some risk to the class action status throughout the trial. The court noted that the *Ho* plaintiffs recently had sought to create a sub-class in the original action,³⁷² raising “serious questions about the proper definition of the class in the NAACP action.” The court noted the possibility that the composition of the *Ho* class also might need re-examination “in light of the different needs of limited English proficiency students.”³⁷³ Any redefinition of the classes requiring new counsel would have lengthened the proceedings, so this supported settlement. The full record, with the action settling on the day of trial after extensive discovery, supported settlement. The experience and views of counsel, especially the governmental participants, favored settlement as well.

The court then turned to the reactions of class members. The fact that only one written statement of support was filed, from the Asian American Legal Foundation,³⁷⁴ was not dispositive because the notice of settlement had informed class members not to take action if they were satisfied with the settlement. Similarly, with a class of over 65,000 members in the *SFNAACP* suit, the court did not view twenty letters in opposition to be an inordinately large number.³⁷⁵

The court addressed the comments issue by issue, taking particular note of Gary Orfield’s objections. The court commented that “most of the objections reflect a misunderstanding of the terms of the settlement or of the law that applies to desegregation orders.”³⁷⁶ The first concern was that

370. *Id.* at 1029.

371. *Id.* The court reviewed many of the events discussed here, including the Ninth Circuit’s discussion of the defendants’ “conclusory” materials, the court’s assessment of the evidence at the time of the motion for preliminary injunction, the “conclusory” and “minimal” testimony of the experts’ reports, and the change of positions of the state board of education and the state superintendent.

372. The motion sought to redefine the class in the *SFNAACP* action as all persons of African American or Latino descent who are eligible to attend San Francisco public schools and the class in *Ho* as all other persons eligible to attend San Francisco public schools. See *Ho* Plaintiffs’ Motion to Redefine Classes to Reflect Class Representatives’ Position at 1, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 4, 1999) (No. C-78-1445-WHO).

373. *San Francisco NAACP*, 59 F. Supp. 2d at 1031. This comment came as a bit of a surprise given that the court had rejected this point several times previously. Perhaps this was a warning shot to keep the *Ho* plaintiffs from becoming too complacent.

374. Amy Chang, who had been so involved early on in instigating what became the *Ho* suit, is a founder of this organization.

375. See *San Francisco NAACP*, 59 F. Supp. 2d at 1032.

376. *Id.* at 1033.

resegregation would occur. The court noted that the school district was not precluded from attempting to ensure diverse student bodies in each school. "The settlement merely precludes the SFUSD from using race or ethnicity as the primary or predominant consideration in determining student admissions."³⁷⁷ The court referred to the testimony of the state superintendent's expert, who was prepared to testify "that it is possible to devise a student assignment system using a combination of individual and census-derived socioeconomic factors to assure reasonable socioeconomic diversity at each school, which would not result in the ethnic resegregation of the schools."³⁷⁸ The court noted that the agreement provided for the possibility of further modifications under Paragraph G. Thus, the agreement that the school district could "attempt to achieve a diverse student body without using race-based student assignments was fair and reasonable in light of the very slim possibility that defendants would have prevailed at trial."³⁷⁹

The court then addressed those, like Orfield, who objected to the December 31, 2002, termination date. The court pointed out that this was a goal and the court would not dissolve the decree "if there is evidence that vestiges of segregation remain to be remedied."³⁸⁰ The court noted the Supreme Court's holding that consent decrees are not intended to operate in perpetuity.³⁸¹ With the decree already having operated for sixteen years, planning to terminate the decree at the end of 2002 was appropriate. In response to those who opposed the termination date, the court asked them to shoulder the burden of proof:

If any person who opposes the settlement of this action believes that (1) vestiges of segregation still exist in the SFUSD; (2) the Consent Decree, or some part thereof, is necessary to remedy those vestiges of segregation; and (3) none of the current parties to the litigation represents his or her interests, that person now has three years to seek to intervene in the action and to gather the evidence necessary to oppose termination of the Consent Decree.³⁸²

377. *Id.* at 1034. At this point, and in one or two other places in the opinion, the court did not use the precise language from Paragraph C of the Agreement. In hindsight, the court might have prevented controversy later had it used the exact language. *See id.* at 1025. Thus, here, the court should have said "in determining [the criteria for] student admissions."

378. *Id.* at 1034.

379. *Id.* In response to the comments in opposition that referred to the decrease of African American and Latino students admitted to Lowell High School for the fall of 1999, the court noted that student assignments had to be made on very short notice because of the Ninth Circuit's rulings, without the time to carefully devise a new non-race-based system.

380. *Id.* at 1035.

381. *See id.* at 1035 (citing *Dowell*).

382. *Id.* at 1038-39. In an earlier portion of the opinion, the court noted that "If . . . any party[] believes that they can prove this difficult causation issue, and are willing to dedicate the time and money to do so, they are welcome to attempt to do so. The students of San Francisco will only benefit from such an effort." *Id.* at 1038. However, "[n]one of the parties to the litigation have been able thus far to demonstrate that the current problems in the SFUSD have been caused by the prior governmental discrimination that justified the adoption of the Consent Decree in 1983." *Id.*

The court addressed the concerns of Chinese for Affirmative Action, META, and Orfield with respect to the educational needs of limited English proficiency students. The court pointed out that the decree was never intended to address these concerns, although the Ninth Circuit had raised the issue in 1993. Nothing in the decree precluded the school district from taking action to address these issues.³⁸³

The court then addressed the objections to making it optional for parents and students to identify themselves by race or ethnicity, "except as required by state or federal statute or regulation."³⁸⁴ Some objected that this provision was inconsistent with the requirement that the SFUSD make data available in October 2000 and 2001 concerning the racial composition of each school.³⁸⁵ The court noted that the *Ho* plaintiffs had alleged that required self-identification by race itself was a constitutional violation. "Whether or not that position has legal merit,"³⁸⁶ the parties agreed to the specified changes. The court was clearly concerned that making racial self-identification optional might make it harder to accurately depict the racial composition of the schools. If the court could have rejected this one provision, it probably would have done so.³⁸⁷ However, the problems with this provision did not outweigh the benefits of settlement.

In yet another place in the same section of the opinion, the court seemed to want to retreat to the position it probably would have taken had the Ninth Circuit not intervened. The court noted a party moving to terminate a desegregation consent decree must demonstrate good faith compliance and the elimination of the vestiges to the extent practicable. *See id.* at 1038 (citing *Dowell* and *Rufo*). Nevertheless, the parties selected an express termination date—despite a full record of information about the social and educational problems that undoubtedly exist in the school district—in light of the inability of the defendants to meet the requisite burden of demonstrating the connections to illegal behavior prior to 1983, which could transform these social problems into legally significant vestiges of prior *de jure* segregation. Given the course of the several pieces of litigation reviewed here, which now stretches back over 30 years, and the combined resources of the school district, the State Superintendent of Public Instruction, the SFNAACP, and the phalanx of attorneys representing these parties, it seems highly unlikely that someone else will discover the magic bullet that eluded everyone else.

383. *See id.* at 1036. The settlement, in fact, took note of the language needs of the students. *See id.* at 1025 (¶ C), 1036. The court also rejected META's complaint that the Latino community had not been meaningfully included in the settlement negotiations. The court rejected these concerns; it relied on its prior findings of the adequacy of the SFNAACP's representation, the grant of amicus status to META, its appointment to the advisory committee, and the fact that there was no reason to think that anyone else would have been able to demonstrate the legal efficacy of the race-based assignment system. *See id.* at 1038. The court might have also noted that META had not made any attempt to participate in the *Ho* case, either as an intervenor or as an amicus, in the five years the case was pending.

384. *Id.* at 1036 (quoting ¶ D).

385. *See id.* (citing ¶ G).

386. *Id.* at 1036; *cf.* *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 862 (recognizing the irreparable injury of mandatory self-classification).

387. *See San Francisco NAACP*, 59 F. Supp. 2d. at 1037 (provision not "so unfair as to require jettisoning the entire settlement").

The court did accept Orfield's suggestion that it increase its oversight of the consent decree.³⁸⁸ The court ordered the parties to respond to the recent reports submitted by the Advisory Committee and the Consent Decree Monitor and to submit a plan for addressing the issues raised in those reports. The court also stated that it would hold yearly hearings to require the parties to address the findings in the reports so as to create a detailed record for the final determination of whether the goals of the decree have been fulfilled to the extent practicable.³⁸⁹ Having addressed all of the identified issues, the court formally approved the settlement agreement.³⁹⁰

E. The New Plan; A New Dispute

The school district started to develop a new plan through the spring and summer of 1999. The local acting superintendent of schools appointed a large committee, led by the school district's director of integration. The school district provided drafts of the plan to the *Ho* plaintiffs and the SFNAACP for review and comment in August and September 1999. Although the plan went through at least three other official versions, the *Ho* plaintiffs were not given another opportunity to comment on the plans.³⁹¹

The expectation in the early spring of 1999 was that the school district committee would spend a significant amount of time figuring out how to

388. The court did not mention that in his written objection, Orfield said he wanted to leave the advisory committee. See Gary Orfield, Report on the Proposed Settlement (Apr. 15, 1999), attached as Ex. A to Order, at 11, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Apr. 16, 1999) (No. C-78-1445-WHO). The tone of Orfield's comments suggest an intense pique at losing control of the process he had dominated for so long through his special relationship with Judge Orrick:

I would certainly not have spent a great deal of time working on very complex issues of educational inequality had I thought that there was any chance that the entire effort would be junked without a hearing by a group of lawyers who did not even bother to address the urgent issues of denial of equal education we documented or consult with us on the feasibility of resolving them within the arbitrary deadline set in this decree.

Id. at 1.

389. At this writing, the briefing schedule has been established, but the court has not yet established a hearing date. See Order, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 14, 2000) (No. C-78-1445-WHO). However, without a clear statement of what the original harm was that justified the decree in 1983 (which five years of intense litigation in *Ho* failed to establish), this exercise seems hopelessly ill-focused. The court will be unable to declare that any matter raised in the reports is a legally significant "vestige" within the purview of a United States District Court to order fixed; without a clear statement of the defendants' wrongdoing and the requisite causal linkage, these are social issues that would be appropriate for the school district to address voluntarily as it implements its educational mission.

390. See *San Francisco NAACP*, 59 F. Supp. 2d at 1039.

391. This arguably violated the right of the *Ho* plaintiffs to review and comment on the plan (see ¶ B). The court subsequently found that the school district had violated this provision of the agreement by not giving the state superintendent an opportunity to determine whether the proposed new plan complied with the law and the Settlement Agreement. See Memorandum Decision and Order at 32, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 19, 2000) (No. C-78-1445-WHO).

achieve what they deemed to be an optimal level of diversity using two primary mechanisms. First, the expectation was that the committee would propose to redraw school attendance zones, as the state superintendent's expert suggested, in order to maximize diversity and use a race-neutral lottery system to assign students within the zones.³⁹² Second, the school district committee would test a variety of socio-economic factors to determine what sort of a mix would best achieve the racial and ethnic diversity the school district wanted to maintain.³⁹³ Done properly, within the limitations negotiated in the settlement, the school district probably could have obtained the approval of the parties of a new race-neutral plan for

392. Cf. text accompanying *supra* notes 332–340 (discussion of failed stipulation regarding modification, which contemplated use of attendance zones); cf. also 1999 Monitor's Report, *supra* note 255, at 57 (describing meeting of monitoring team with district officials, which took place one month before the Settlement Agreement with the *Ho* plaintiffs was negotiated, at which possible race-neutral solutions were suggested and discussed).

393. Indeed, the settlement was praised for being a path-breaking attempt to use socio-economic status as one means of achieving diversity in view of the severe strictures placed on the use of race and ethnicity as criteria. See, e.g., Peter Waldman, *School Accord Takes Emphasis Off Race Factor*, WALL ST. J., Feb. 18, 1999, at B9 (quoting Richard Kahlenberg, "San Francisco has just moved to the cutting edge of what we know about what makes a good school."); Richard D. Kahlenberg, *Economic School Desegregation: San Francisco's Groundbreaking Plan*, EDUC. WK., Mar. 31, 1999, at 52; see also Venise Wagner, *End of Race Decree Sparks Ideas to Aid Black Youth*, S.F. EXAMINER, Apr. 19, 1999, at A1.

Some have advocated class-based affirmative action as one important substitute for race-based affirmative action. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996). Critics of class-based measures tend to focus on the potential impact on admissions at selective universities, rather than considering whether such a system could work in an environment where grades and test scores are not factors, which is the case for all but one of San Francisco's public schools. See, e.g., CHRISTOPHER EDLEY, *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE AND AMERICAN VALUES* 150–58 (1996); TAKAGI, *supra* note 111, at 197–201; Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 24–28 (Gary Orfield & Edward Miller eds., 1998); Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 33, 37–38 (Gary Orfield & Edward Miller eds., 1998); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996); Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997) (all contending that consideration of social class can't substitute for race in selective admissions systems); see also TAKAGI, *supra* note 111, at 185–87 (discussing embrace of class-based affirmative action by liberals); Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1702–07 (1997) (suggesting that class-based affirmative action might supplement, but should not supplant, race-based affirmative action); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 256 (1999) (contending that school finance reform is a "helpful supplement," but a poor substitute for racial and socioeconomic integration); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998) (considering constitutionality of race-neutral means to achieve race-conscious goals).

the 2000-01 school year, which would have maintained a high level of racial and ethnic diversity in the school district.

If there was going to be a dispute about implementation, I assumed it would not arise until the fall of 2000. Two scenarios for a dispute that would arise then seemed plausible. The first was that the SFNAACP or the school district would raise concerns about what were deemed to be unacceptable levels of racial or ethnic concentration; in that case, the *Ho* plaintiffs' position could be that those concerns were too generalized to trigger the relatively narrow provisions of the Settlement Agreement's safety net.³⁹⁴ The second, which could arise alone or in conjunction with the first, was that the SFNAACP and/or the school district would propose a race-conscious solution for the perceived racial or ethnic concentration. In that case, the *Ho* plaintiffs' position would be that no race-conscious solutions were permitted under any provision of the settlement, and, in any event, the proposed solution was not narrowly tailored because it was overbroad and/or because the school district failed to consider all possible race-neutral methods first.³⁹⁵

Surprisingly, the SFUSD proposed a blatantly improper plan in the fall of 1999.³⁹⁶ The new plan submitted to the court referred to four factors that would have constituted a "diversity index":

- (1) Low socio-economic status.³⁹⁷
- (2) Limited proficiency in English.³⁹⁸
- (3) Limited math and reading achievement levels.³⁹⁹

394. See *San Francisco NAACP*, 59 F. Supp. 2d at 1026 (¶ G) (limited to "identifiable racial or ethnic concentration at a particular school or schools that will adversely affect the SFUSD's educational goals or programs in that school or schools").

395. "A 'race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race neutral ones—have been considered and tried.'" *Walker v. City of Mesquite*, 169 F.3d 973, 983 (5th Cir. 1999) (quoting *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997)), *cert. denied*, 120 S. Ct. 969 (2000).

396. *San Francisco Unified School District, Proposed New Student Assignment Plan* (Nov. 23, 1999), attached to Local School District Defendants' Resubmission of Proposed New Student Assignment Plan Pursuant to Order Filed November 2, 1999, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Nov. 23, 1999) (No. C-78-1445-WHO) [hereinafter "PNSAP" or "new plan"]. See Paul Elias, *Even with Fees Awarded, S.F. School Fight Continues*, S.F. RECORDER, Nov. 9, 1999, at 4 ("Usually, when a judge grants a plaintiff's attorney's motion for attorney fees, that signifies two things: the plaintiffs won and the case is over. But this is San Francisco and bedrock liberal notions such as desegregation die hard—even if a federal judge has expressed serious doubts about it."). In contrast, other localities have seen the handwriting on the wall and are looking for new ways to achieve diversity besides race. See, e.g., Rick Bragg, *Florida Plan Would Change Admissions Based on Race*, N.Y. TIMES, Nov. 11, 1999, at A1 (dropping race-based admissions in favor of guaranteeing top 20% of every high school graduating class a place in state universities); Marc Albert, *School District May Drop Race From Admission Policy*, BERKELEY VOICE, Nov. 5, 1999, at A1 (Berkeley, California is considering using geography and block-by-block home price data to promote diversity in public schools); Darryl Campagna, *Schools May Drop Race as Criterion*, BUFFALO (N.Y.) NEWS, Jan. 11, 2000 (using lottery).

397. See PNSAP, *supra* note 396, at 65 (categorizing participation in free/reduced lunch, CalWorks, and/or public housing).

398. See *id.* (categorizing levels of English Proficiency).

399. See *id.* (categorizing students on whether their scores fell below 25th percentile in reading and/or math on standardized achievement tests).

(4) Racial/ethnic diversity.⁴⁰⁰

The new plan anticipated having a computer determine who would be the next most diverse student in the applicant pool for each school, and admitting that student.⁴⁰¹ Then the next most diverse student would be admitted, until the school (and presumably program and classroom) would be filled. The complex plan did not fully explain, however, how these four factors would interact in the computer algorithm.⁴⁰²

The first three factors might have been tolerated by the *Ho* plaintiffs,⁴⁰³ if the school district wanted to use them.⁴⁰⁴ The fourth factor was completely unacceptable to the *Ho* plaintiffs. The SFUSD contended that because race/ethnicity was only one of four factors in the proposal, it was not "the primary or predominant consideration."⁴⁰⁵ The *Ho* plaintiffs be-

400. See *id.* at 7, 65–66. The new plan contemplated using 12 different races or ethnicities, rather than the nine recognized in the consent decree: Arabic [sic], Chinese, Filipino, Japanese, Korean, Latino, Other White, Other Non-White, Samoan, Southeast Asian. There was no provision for students of mixed race. Students would have received a "racial/ethnic rating," but the new plan did not explain exactly how this would be quantified. *Id.* at 65–66. Any student checking "decline to state" actually would have been affected by this system because he/she would have received no points for race/ethnicity. *Id.* at 66.

401. The mechanics of the proposed new plan are described in Memorandum Decision and Order at 7–15, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Jan. 19, 2000) (No. C-78-1445-WHO) [hereinafter January 2000 Memorandum Decision].

402. See Order at 2, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 2, 1999) (No. C-78-1445-WHO) ("The New Plan contains a great deal of technical detail, but lacks a plain English explanation of exactly how race or ethnicity is used to assign students to any given school."); cf. Memorandum Decision and Order at 4, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 2, 1998) (No. C-78-1445-WHO) (requiring "specific language containing specific guidelines for the assignment of students," rather than "vague proposals").

403. See January 2000 Memorandum Decision, *supra* note 401, at 7 (noting portions of the plan to which none of the parties objected).

404. No data in the record suggested that these criteria would have gotten the district where it seemed to want to be in terms of racial and ethnic diversity. For example, advantaging limited English proficiency students would assist immigrant Asian children as much as it would help immigrant Latino children. It is not obvious why this factor would have helped African American children. See PNSAP, *supra* note 396, at 41 (remarks of Christina Wong) (not widely known that Chinese American limited English proficiency students score lower than African American children).

What was particularly discouraging about the PNSAP was its utter lack of attention to educational quality. See, e.g., San Francisco School Accountability Project, *San Francisco Schools: Diversity and Achievement in Conflict 2* (Dec. 9, 1999) ("the assignment plan proposes no program to bring about net improvement in the academic achievement or educational result of any school").

405. The school district officials seemed to have wished away the distinction established in paragraph C between "setting the criteria" (i.e., means) and "considerations" (i.e., goals). They seem to have relied on Judge Orrick's imperfect paraphrasing of the agreement in the opinion approving the settlement. See, e.g., *San Francisco NAACP*, 59 F. Supp. 2d at 1035 ("The Court finds that the proposed settlement permits the SFUSD to work to achieve a diverse student body, as long as it does not use race or ethnicity as a primary consideration in assigning students to schools.") At least some SFUSD officials had the hope that this was a permissible reading of the settlement from the first. See Caroline Hendrie, *San Francisco Desegregation Decree to End*, EDUC. WK., Feb. 24, 1999, at 1 (identifying different views of the parties on the meaning of

lieved that any racial/ethnic criterion for assigning or admitting students was forbidden by the settlement.⁴⁰⁶ Moreover, the school district made no attempt to explain how the proposed race-conscious plan could pass constitutional muster under strict scrutiny, which was legally required.⁴⁰⁷

The *Ho* plaintiffs had other concerns about the school district's conduct and proposal during this period. The school district collected racial/ethnic data on the application forms for the 2000–01 school year, rather than waiting to ask at the time of enrollment, as the *Ho* plaintiffs contend the agreement requires. The portion of the application form devoted to racial data included a "decline to state" check-off box, but did not indicate that providing the information was optional.⁴⁰⁸ The proposed

the settlement agreement); see also Julian Guthrie, *Judge Critical of S.F. Enroll Plan*, S.F. EXAMINER, Nov. 4, 1999, at A1 (quoting SFNAACP lawyer, "The district's (new) plan makes race one of four factors in enrollment, so it's no longer a question of someone being admitted to a school based on race"). In the hearing on the proposed new plan, the SFUSD's attorney relied on this reading of the agreement. See Transcript of Proceedings at 5–12, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 17, 1999) (No. C-78-1445-WHO) [hereinafter Transcript]. The court firmly rejected the school district's reading of this portion of the settlement agreement. See January 2000 Memorandum Decision, *supra* note 401, at 23 ("The fact that other factors are also considered before admitting the student does not make the plan facially race neutral.").

The court might have prevented this particular dispute from arising if it had accurately quoted the agreement in its order approving the settlement. Thus in the example of imperfect paraphrasing given above, the court should have said "as a primary or predominant consideration in *setting the criteria for* assigning students to schools." Obviously, the text of the agreement controls, rather than an incomplete judicial paraphrasing of any one portion. See *San Francisco NAACP*, 59 F. Supp. 2d at 1036 ("[T]his court cannot rewrite the settlement agreement. . . . It cannot delete, modify or substitute certain provisions in favor of provision that the Court would prefer").

406. See *Ho* Plaintiffs' Memorandum of Points and Authorities in Opposition to San Francisco Unified School District's Proposed New Student Assignment Plan at 13–16, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Dec. 10, 1999) (No. C-78-1445-WHO).

407. The court specifically directed the school district to provide the explanation in a supplemental brief. See Order at 2–3, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 2, 1999) (No. C-78-1445-WHO); cf. Memorandum Decision and Order at 4, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Dec. 2, 1998) (No. C-78-1445-WHO) (requiring application of strict scrutiny to any proposed race-based modification to the consent decree); *accord*, *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d at 865. In response, the school district asserted that strict scrutiny is not applicable to the new plan. See Local School District Defendants' Re-submission of Proposed New Student Assignment Plan Pursuant to Order Filed November 2, 1999, at 6, 9, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Nov. 23, 1999) (No. C-94-2418-WHO).

408. The court denied the *Ho* plaintiffs' motion for a temporary restraining order ("TRO") preventing the allegedly improper use of the forms on November 8, 1999. Although the court agreed that there was "no doubt" the application materials to be distributed violated the settlement agreement, it denied the request for a TRO because in its view, the *Ho* plaintiffs had not proven any irreparable injury due to the collection of the data without the safeguards. See Order at 7, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 12, 1999) (No. C-78-1445-WHO). The *Ho* plaintiffs filed a motion to redact the improperly collected information and to hold the school district in contempt of court. The court agreed that the application materials that were distributed violated the agreement because parents were not informed

plan could have penalized students who chose not to state their race or ethnicity.⁴⁰⁹ For Lowell High School, which has been the focus of so much of the attention surrounding the suit, the new plan proposed to return to the admission policies in effect from 1996 until the February 1999 settlement.⁴¹⁰ This part of the proposed new plan also violated the settlement agreement and the Constitution because it included race as a criterion of admission in the name of diversity.⁴¹¹ Not surprisingly, the district court rejected the proposed new plan on December 17, 1999,⁴¹² for completely

properly. The court rejected, however, the request for a contempt finding and for re-daction in harsh terms. The court was only willing to require the school district to notify parents that they could change their child's status to "decline to state race or ethnicity" on the application materials. Memorandum Decision and Order at 20, *San Francisco NAACP v. San Francisco Unified Sch. Dist.* (N.D. Cal. Mar. 1, 2000) (No. C-78-1445-WHO).

409. See January 2000 Memorandum Decision, *supra* note 401, at 34–35.

410. The school district had a great deal of difficulty in deciding what to do about Lowell's admissions policy. Until early October 1999, drafts of the proposed new plan had no special provisions for Lowell. When the committee working on the proposed new plan suddenly inserted language into a draft that would allow only a fixed percentage of top-scoring students from each middle school to apply to Lowell, it was quickly withdrawn in the face of stiff parental opposition. See Nanette Asimov, *Anger Over Plan to Alter Lowell Admission Rules*, S.F. CHRON., Oct. 13, 1999, at A15. The plan the school district filed with the court in October had no provisions concerning Lowell. See Nanette Asimov, *S.F. Schools Leave Hole in Diversity Plan*, S.F. CHRON., Oct. 21, 1999. The court requested an explanation of the plan's impact on Lowell. See Order at 3, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 2, 1999) (No. C-78-1445-WHO). The school district responded by inserting the plan it had followed for the classes entering Lowell from 1996 to 1998. See PNSAP, *supra* note 396, at 11–12.

411. At Lowell, "To achieve the District's goal to promote diversity in all schools, programs, and classrooms, extenuating circumstances will include special consideration for traditionally under-represented and under-served student populations (Native American, Latino, and African American students)." PNSAP, *supra* note 396, at 12. With respect to the other school in the district with special admissions requirements, School of the Arts, the new plan proposed to develop an eligibility pool through an audition and demonstrated proficiency in the area of talent, but then to "assess" [admit?] students "in a manner consistent with the diversity index." *Id.* at 11–12. For the court's understanding of the new plan, see January 2000 Memorandum Decision, *supra* note 401, at 34 (stating that Lowell Plan "expressly grants preferences . . . and thus prefers those students over equally qualified students of other races.").

412. At the direction of the court, the attorneys for the parties met with a mediator in the days before the hearing. The court ordered the acting superintendent of schools and at least one member of the school board to participate in the mediation sessions. The court also solicited the views of the Consent Decree Advisory Committee on the proposed new plan. See Order, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 18, 1999) (No. C-78-1445-WHO). The Advisory Committee endorsed the plan. See Report of the Consent Decree Advisory Committee on San Francisco's Proposed New Plan, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Dec. 13, 1999) (No. C-78-1445-WHO). The mediation failed to reconcile the differences of the parties. See Transcript, *supra* note 405, at 39.

failing to meet either the constitutional test of strict scrutiny⁴¹³ and for violating the terms of the settlement agreement in numerous ways.⁴¹⁴

The court's decision was in line with recent appellate opinions that have considered and rejected similar assignment plans. For example, the Fourth Circuit rejected a student assignment plan remarkably like the school district's proposal. In *Tuttle v. Arlington County*,⁴¹⁵ the circuit court rejected a plan using a diversity index containing three of the four factors the SFUSD proposed to use.⁴¹⁶ The panel did not have to decide whether the Arlington, Virginia, school district, which was not under court order to eliminate *de jure* segregation, could rely upon diversity as a compelling governmental interest to justify the plan.⁴¹⁷ That school district's goal of nonremedial racial balancing and its failure to consider non-race-based

413. "[T]he District fails to even attempt to identify a compelling governmental interest, or to demonstrate that the New Plan is narrowly tailored to further that interest." January 2000 Memorandum Decision, *supra* note 401, at 28. The court also criticized the school district's failure to present evidence showing what race-neutral plans the district allegedly tried before turning to the proposed new plan. *See id.* at 30.

414. The court found that the school district violated Paragraph B of the settlement because it was submitted to the other parties and the court before the state superintendent had a chance to determine whether it complied with the law and the settlement agreement's other terms. *See id.* at 31–32. The new plan violated paragraph C's requirement that it develop "lawful criteria for admission." *Id.* at 33. It also violated paragraph C because race could be the determining factor in deciding who is selected for admission to a school, and because it expressly granted preferences for certain races and ethnicities at Lowell High School. *See id.* at 33–34. The proposed new plan violated paragraph D by failing to notify students that no adverse consequences would result from failing to providing racial data; in fact, the proposed plan would have penalized students who declined to state their race or ethnicity. *See id.* at 34–35.

415. 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. ____, 68 U.S.L.W. 3497 (Mar. 28, 2000) (No. 99-1274). Compare *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999) (rejecting school transfer policy based on a racially based diversity profile), *cert. denied*, 120 S. Ct. 1420 (2000), with *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247 (D. Mass. 1999) (denying preliminary injunction to stop use of race-conscious assignment policy).

416. Low reading and math achievement scores appeared in the San Francisco plan only.

417. The *Tuttle* court assumed, without holding, that diversity might be a compelling governmental interest. *See Tuttle*, 195 F.3d at 705; *cf., e.g., Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir.) (rejecting diversity as a compelling governmental interest), *cert. denied*, 518 U.S. 1033 (1996); *Tracy v. Board of Regents*, 59 F. Supp. 2d 1314, 1322 (S.D. Ga. 1999) (criticizing "definitional drift" inherent in concept of "diversity"); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 634 (W.D.N.Y. 1999) ("Facial diversity is not true diversity and is not a proper goal."). For discussion in the secondary literature, see Lino A. Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505 (1999) (arguing that "diversity" masks an illegal racial preference); Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1229 (1997) (stating that "everyone likes diversity, so long as it falls within a fairly narrow ideological range"); Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admission Process*, 77 N.C. L. REV. 1479 (1999) (defending diversity as compelling interest); John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49 (1995) (suggesting that diversity be used in a more narrowly tailored fashion); Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995 (1999) (diversity should be considered compelling interest).

alternatives doomed the plan because it was not narrowly tailored.⁴¹⁸ Similarly, the First Circuit rejected a race- and ethnic-conscious admissions plan for Lowell High School's counterparts in the Boston school system.⁴¹⁹ It was hardly surprising that the school district's proposed plan met the same fate.⁴²⁰

Concerned that student assignments needed to be made for the coming school year,⁴²¹ the court gave the school district the option of deciding to use the proposed new plan absent race or to abide by the preliminary injunction, which governed assignments for the 1999-2000 school year.⁴²² The school district has indicated that it—most reluctantly—preferred the preliminary injunction⁴²³ and that it may appeal the court's rejection of the

418. See *Tuttle*, 195 F.3d at 705–06. “We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of racial and ethnic groups.” *Id.* at 707.

419. See *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). The plan the First Circuit rejected provided that for Boston's three examination schools, half of the available seats at each school were to be filled according to a rank ordering of the applicants' composite scores (grade point and examination results). The other half of the seats were to be filled on the basis of the composite score ranking and “flexible racial/ethnic guidelines,” which would consider the racial/ethnic composition of the remainder of the school's qualified applicant pool. *Id.* at 793. For further discussion of *Wessmann*, see Recent Case, 112 HARV. L. REV. 1789 (1999).

420. See Order at 1, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Nov. 2, 1999) (No. C-78-1445-WHO) (stating that it was “not clear to the Court how the New Plan avoids the alleged constitutional infirmities of the previous assignment plan” and ordering additional briefing by SFUSD). But see Julian Guthrie, *School Board Rebuffs Judge*, S.F. EXAMINER, Nov. 5, 1999, at A1 (“ignoring” judge's warning). Remarkably, the school board's written response to the court's order asserted that strict scrutiny was not required because the court had already “approved settlement terms which do not include or contemplate a race-based student assignment process.” Local School District Defendants' Resubmission of Proposed New Student Assignment Plan Pursuant to Order Filed November 2, 1999, at 6, *San Francisco NAACP v. San Francisco Unified Sch. Dist.* (N.D. Cal. filed Nov. 23, 1999) (No. C-78-1445-WHO). The court found this explanation “entirely unsatisfactory.” Transcript, *supra* note 405, at 40.

421. As the court put it from the bench, “It's Show Time.” Transcript, *supra* note 405, at 39. The court rejected the suggestion that the school district be given more time to submit additional briefing and evidence to show that the proposed new plan actually was constitutional because the school district had already ignored the court's previous direction to do so. In addition, the court noted the school district's “record throughout the past several years of this litigation of being unwilling or unable to gather evidence sufficient to withstand strict scrutiny.” January 2000 Memorandum Decision, *supra* note 401, at 36.

422. The court's preference clearly would have been the new plan, with race deleted. However, the court said it did not want to micro-manage, so it left the choice to the school district. See January 2000 Memorandum Decision, *supra* note 401, at 37–38.

423. See Notice of Student Assignment Plan Option Selected by the SFUSD Pursuant to the Order of the Court Filed December 17, 1999, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Jan. 7, 2000) (No. C-78-1445-WHO). As one school board member was quoted as saying, “[w]ithout race and ethnicity as an option, it takes out one of the biggest reasons for using the index.” Nanette Asimov, *S.F. District Oks Race-Neutral School Plan*, S.F. CHRON., Jan. 7, 2000; cf. Local School District Defendants' Resubmission of Proposed New Student Assignment Plan Pursuant to Order Filed November 2, 1999, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Nov. 23, 1999) (No. C-78-1445-WHO) (claiming that race/ethnicity were

racial components of the proposed new plan.⁴²⁴ To succeed on appeal, however, the school district will have to convince the appellate court both that Judge Orrick was clearly erroneous in his interpretation of the agreement as requiring the submission of a race-neutral plan⁴²⁵ and that the race-conscious plan the school district submitted did not need to meet the strict scrutiny test.⁴²⁶ These seem to be unlikely prospects.

IV. REFLECTIONS ON THE *HO* SUIT

The *Ho* suit is rife with important issues. In this Part, I will highlight the primary examples for further scholarly attention of those interested in considering some of the implications of the case.

A. The Burden of Proof

The question of who bears the burden of proof was central to the outcome of the *Ho* case. If any issue in the case was worthy of Supreme Court review,⁴²⁷ perhaps this was it. The problem is that although *Martin v. Wilks*⁴²⁸ permits a collateral attack like *Ho* to be filed, the Supreme Court

not "primary or predominant factors" in the index and that the proposed new plan was not designed to achieve racial balancing). Nevertheless, this was a surprising choice, as all parties expect that it will lead to at least somewhat less racial and ethnic integration of entering classes in certain schools than if the school district had chosen to utilize the permissible parts of the proposed diversity index. For the school district's options, see January 2000 Memorandum Decision, *supra* note 401, at 38. On its surprising choice and the ramifications thereof, see Katherine Seligman, *S.F. Dropping Bid for Racial Criteria*, S.F. EXAMINER, Jan. 7, 2000 (quoting SFNAACP attorney as saying, "The shock still hasn't worn off" because school district did not choose the modified diversity index); Julian Guthrie, *Race Gap to Widen Further at Lowell Next Year*, S.F. EXAMINER, Mar. 10, 2000, at A1 (reporting on continued drop off of blacks and Latinos admitted to Lowell).

424. See Protective Notice of Appeal to the United States Court of Appeals for the Ninth Circuit of Defendant San Francisco Unified School District, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Feb. 15, 2000) (No. C-78-1445-WHO) [hereinafter SFUSD Notice]; Protective Notice of Appeal to the United States Court of Appeals for the Ninth Circuit of Defendant San Francisco NAACP, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Feb. 16, 2000) (No. C-78-1445-WHO) [hereinafter SFNAACP Notice].

425. See, e.g., *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 574 (1984) ("scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it") (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)).

426. See Order, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. Dec. 17, 1999) (No. C-78-1445-WHO) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 20, 224 (1995); *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d at 863-65). Since the school district made no effort even to try to meet the strict scrutiny test, it is foreclosed from arguing that it met that stringent requirement. See January 2000 Memorandum Decision, *supra* note 401, at 28, (criticizing "myopic focus" of school district's brief).

427. The parties and the district court certainly understood that the case could well be headed there. See *San Francisco NAACP*, 59 F. Supp. 2d at 1030. The case would have given the Supreme Court the perfect opportunity "to make reasoned decisions about affirmative action while acknowledging the concerns of Asian Americans." Gee, *supra* note 3, at 657.

428. 490 U.S. 755 (1989). Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 821 (1996), has argued:

did not address who bears the burden of proof with respect to the legitimacy of the challenged remedy.⁴²⁹ The defenders of the consent decree contended that the *Ho* plaintiffs should bear the exact burden that a school district would bear under *Freeman v. Pitts*⁴³⁰ if it sought termination of court supervision. Judge Orrick certainly has been tempted by that argument,⁴³¹ but the Ninth Circuit has firmly rejected it.⁴³² On the basis of the record in *SFNAACP* and *Ho*, this would have been an almost insurmountable burden; the *Ho* plaintiffs would have had to prove the inverse, i.e., that every statistic or condition in the school district that the defenders of the consent decree raised was not a vestige of an unproven, unspecified, and only assumed act of *de jure* segregation.⁴³³ As the Ninth Circuit recognized, it made more sense to require the defenders of the plan to justify their use of race under a standard of strict scrutiny.⁴³⁴

Other courts that have recently faced the burden allocation question have come to reasonably coherent results. In Boston, because the student

The Lowell case arises as much from civil procedure problems as it does from substantive equal protection doctrine. It raises, acutely, issues about the importance of representation in structural litigation and the potential for unanticipated collateral attacks on consent decrees. Whatever its outcome on the merits, this challenge should signal the end of racial bipolarity in civil procedure.

429. For example, Doug Laycock, in discussing *Martin v. Wilks*, has contended:

To accord due process, the original plaintiffs and the employer must bear the burden of proving that a remedy can lawfully override the objecting parties' rights under the Constitution and federal civil rights laws—"the burden of proving their case as against whatever defenses" the objecting parties might interpose. That can be accomplished only if the court is willing to "set aside the proposed decree and consider the case anew."

Laycock, *supra* note 190, at 1025 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 554 (1965)).

430. 503 U.S. 467 (1992).

431. See *Ho*, 965 F. Supp. 1316 (1997).

432. See *Ho*, 147 F.3d at 865.

433. Among other things, the *Ho* plaintiffs would have needed to demonstrate that teacher expectations were not low or that any low expectations, differential rates in discipline, and lower test scores on the part of any racial or ethnic group did not result from the lingering effects of the unproven *de jure* segregation. See *Freeman v. Pitts*, 503 U.S. 467, 503 (1992) (Scalia, J., concurring) ("allocation of the burden of proof foreordains the result in almost all of the 'vestige of past discrimination' cases"). See generally Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973) (noting "the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion.") (internal citation omitted).

434. For an argument that strict scrutiny should not apply to race-based affirmative action, see, for example, Cedric Merlin Powell, *Hopwood: Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811 (1999). Whatever the merits of that argument regarding voluntary plans, such as those for admissions to public universities, the plan challenged in *Ho* was a court-ordered, race-conscious quota. In this context, there seems to be little serious disagreement that strict scrutiny is the correct standard to apply. See *Ho*, 147 F.3d at 865 (citing cases). Moreover, the obvious impact of the quotas on various minority groups, including Chinese Americans, African Americans, and Latinos, demonstrates the importance of narrow tailoring, a concept integral to strict scrutiny.

assignment system of previously segregated schools had been declared unitary years before,⁴³⁵ school officials had no duty "to ensure the maintenance of certain percentages of any racial or ethnic group in any particular school."⁴³⁶ Therefore, the school district had the burden of justifying its race- and ethnic-based student assignment system by identifying "a vestige of bygone discrimination and provid[ing] convincing evidence that ties this vestige to the de jure segregation of the benighted past."⁴³⁷ In Yonkers, New York, where the circuit panel did not detect any vestiges by use of the *Green* factors and faced a "counterintuitive alignment of parties,"⁴³⁸ the court put the burden of proving the vestiges sufficient to support the race-based plan on those parties, including the school board, contending that such vestiges existed.⁴³⁹ In Montgomery County, Maryland, where the schools had never been run in a *de jure* manner, the school district had the burden of justifying its race-based enrollment plan under strict scrutiny.⁴⁴⁰ In Charlotte, North Carolina, however, the court orders were in place pursuant to findings of *de jure* segregation.⁴⁴¹ The plaintiff, who challenged her denial of admission on the basis that the court's decree should have been terminated, had to shoulder the *Freeman* burden. The district court nonetheless indicated the burden would be lessened where there were not specific findings detailing the conduct or harm the school board was required to ameliorate.⁴⁴²

The Ninth Circuit's allocation of the burden is consistent with these cases. Although the school district was assigning students to schools under court auspices pursuant to the *SFNAACP* consent decree, the lack of prior findings of a strong evidentiary basis for doing so was a proper predicate for placing the burden of proof on the defenders of San Francisco's race-based plan.⁴⁴³

435. See *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

436. *Wessmann*, 160 F.3d at 801. The court cited *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 32 (1971), and *Freeman v. Pitts*, 503 U.S. 467, 494 (1992), for the proposition that once racial imbalance due to *de jure* segregation has been remedied, the district was under no duty to remedy imbalance due to demographic factors. *Accord Tuttle v. Arlington County*, 195 F.3d 698 (4th Cir. 1999) (where schools had been returned to unitary status and released from court supervision, school district had burden to justify policy designed not to remedy past discrimination but to promote racial, ethnic and socioeconomic diversity), *cert. dismissed*, 120 S. Ct. _____, 68 U.S.L.W. 3497 (Mar. 28, 2000) (No. 99-1274).

437. *Wessmann*, 160 F.3d at 801 (internal citation omitted).

438. *United States v. City of Yonkers*, 181 F.3d 301, 311 (2d Cir. 1999). On rehearing, the circuit panel vacated the opinion and remanded for further findings on the existence of record evidence concerning vestiges of *de jure* segregation. See *United States v. City of Yonkers*, 197 F.3d 41 (2d Cir. 1999).

439. See *City of Yonkers*, 181 F.3d 301.

440. See *Eisenberg v. Montgomery County*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

441. See *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971). For background on *Swann*, see DAVISON M. DOUGLAS, *READING, WRITING & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* (1995).

442. See *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228 (W.D.N.C. 1999), *stay granted*, 1999 U.S. App. LEXIS 34574 (4th Cir. 1999).

443. This allocation of the burden of proof is also consistent with the Supreme Court's recent per curiam opinion on burden shifting in a race discrimination case, *Texas v. Lesage*, 120 S. Ct. 467 (1999). In *Lesage*, the plaintiff challenged a single governmental

Because of the possibility of abuse, the burden of proof issue remains important and is worthy of further consideration. Of prime concern is that defendants could be tempted to find a "white knight" willing to initiate a friendly collateral attack suit when they no longer desire to follow consent decrees they have entered, perhaps due to a change in the political viewpoint of the officials.⁴⁴⁴ If the collateral attack plaintiff could claim that it had not been adequately represented in the original action, then it would have virtually no burden of proof under the Ninth Circuit's opinion in *Ho*; the defendant could simply fail to take up the burden of defending the consent decree. If the court did not permit the original plaintiff to intervene or otherwise participate in the defense of the consent decree, or the original plaintiff was unable or unwilling to take up the defense of the decree, it would fall.⁴⁴⁵ This could be a far easier route for a defendant desiring to terminate a decree than going through the trouble of proving all that is required under *Freeman* and *Dowell* to demonstrate that the vestiges of segregation have been eliminated to the extent practicable. In the same vein, it could be a way to avoid the burden of proving that a party is entitled to modification of a decree under *Rufo*.⁴⁴⁶ Scholars and courts should consider how to fairly allocate the burden under different circumstances without allowing such a potential abuse to develop.

decision, the denial of an application to graduate school at the University of Texas, on the basis that the impermissible criterion of race was used in the selection process. The Court, per curiam, held that the plaintiff had no cognizable injury where it was undisputed that the government would have made the same adverse decision even absent the forbidden consideration. The Court also noted, however, that "a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant inquiry in such cases is 'the inability to compete on an equal footing.'" *Id.* at 468 (citing *Northeastern Fla. Chapter, Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993)); accord *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir.) (allocating burden in similar fashion), *cert. denied*, 518 U.S. 1033 (1996).

444. *But see* 28 U.S.C. § 1359 (stating that district court shall not have jurisdiction over collusive suit). This was certainly not our case; if the officials and attorneys of the SFUSD viewed the *Ho* plaintiffs as their knights in shining armor, they have accomplished Oscar™-worthy performances in keeping those feelings hidden for nearly six years.

445. *See, e.g., Podberesky v. Kirwan*, 838 F. Supp. 1075, 1082 n.47 (D. Md. 1993) (noting that defender of affirmative action program must "engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy"), *vacated on other grounds*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); Jenkins, *supra* note 122, at 309 ("an affirmative action defendant cannot advance a vigorous defense of its program on remedial grounds without risking liability to beneficiaries and others under the Constitution").

446. *See* Memorandum Decision and Order re: Preliminary Injunction, *supra* note 232, at 10:

Were it not for the Ninth Circuit's Opinion in this case, the Court would be faced with the difficult task of reconciling *Rufo* and *Adarand* to determine the proper burden of proof where a nongovernment entity challenges the constitutionality of a consent decree that imposes race-based remedies.

B. The Nature of the Proof

One of the continuing themes throughout this litigation has been the weakness of the evidence developed by the SFNAACP (and later, by the school district). Beginning with the precursors to the *Ho* suit back in the 1970s, through the Ninth Circuit's opinion on appeal from the denial of the *Ho* plaintiffs' motion for summary judgment in mid-1998, and the district court's rulings from late 1998 to early 2000, courts have characterized the evidence presented in support of the consent decree in increasingly disparaging terms.

Two explanations for this phenomenon do not have much enduring significance, but others are worthy of further scholarly consideration. The first explanation is the possibility that the school district never engaged in *de jure* segregation against anyone. Judge Noonan employed the material cited by the *Ho* plaintiffs quite effectively, however, in order to demonstrate the long history of intentional race discrimination that has marked the treatment of people of Chinese descent in California and San Francisco.⁴⁴⁷ Judge Noonan might have also reviewed the ugly history of discrimination in California against Asian Americans in general.⁴⁴⁸ It is unlikely that the SFUSD was anything but an "equal opportunity discriminator" with regards to other historically disfavored minority groups;⁴⁴⁹ yet, time and again, courts concluded that the evidence the school district or the SFNAACP offered of *de jure* discrimination against other minority groups was legally insufficient or conclusory. The question is why.

A second explanation is that the evidence did exist or could have been generated through research and expert testimony, but that the lawyers defending the decree were not competent enough to present the evidence.⁴⁵⁰ Yet, the SFNAACP has for years been represented by the same array of experienced attorneys: Thomas Atkins, the former General Counsel of the NAACP,⁴⁵¹ its longtime local counsel, the San Francisco office of the Lawyers' Committee for Civil Rights, and McCutchen, Doyle, Brown & Enersen, a blue chip San Francisco law firm. The SFUSD has been represented for over twenty years by a lawyer who specializes in

447. See *Ho*, 147 F.3d at 863–64.

448. See ANCHETA, *supra* note 4, at 19–40 (reviewing history of legal discrimination against Asian Americans).

449. Cf., e.g., *United States v. City of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988) (detailing extensive evidence of discrimination on the basis of race and gender by the San Francisco Fire Department at approximately the same time period scrutinized in *SFNAACP*, *aff'd as modified*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990); see also James Richardson, *The Emperor Inside the Clothes*, S.F. CHRON., Dec. 5, 1999 (in 1962, San Francisco was "a city with an outward gentility which masked a rigid racial caste system that was as segregated as anywhere in the South (one commentator at the time remarked that in San Francisco 'it's not 'Jim Crow' but 'James Crow'")").

450. See Paul Elias, *S.F. Schools, Asian Students Settle Race Suit*, S.F. RECORDER, Feb. 17, 1999, at 1–2 (noting defendants "essentially had no defense;" "the three defense teams appeared to be taking different tacks and no real lead attorney emerged from the group").

451. See *Morgan v. Gittens*, 915 F. Supp. 457, 460 (D. Mass. 1996). In this Boston school desegregation case, Judge Garrity stated, "Due to his scholarship and long specialized experience, Mr. Atkins is in a class by himself."

representing school boards in desegregation suits nationwide.⁴⁵² The state entities were first represented by experienced counsel in the Department of Education and then by experienced private counsel. The defenders of the decree had amassed an enormous quantity of material, which they planned to offer into evidence.⁴⁵³ The court did everything it could (and some things that it should not have) to ensure the defendants had the evidence necessary to justify the consent decree, if at all possible. The defenders of the decree could have located other experts as well through their national contacts and resources. If this phalanx of experienced lawyers and experts could not ferret out the evidence and make it into a coherent case, it is doubtful anyone could. Nevertheless, the court has invited others to attempt yet again to prove that the school district indeed practiced *de jure* segregation before 1983 and that vestiges linger into the twenty-first century.⁴⁵⁴ No one has yet volunteered.

Beyond these two possible explanations, one can easily see the strategic choices that made the consent decree virtually impossible to defend. The NAACP's decision to frame the SFNAACP class to include all children in San Francisco public schools may have been a fatally flawed idea. The proof of discrimination required to support a remedy that purports to benefit all school children in San Francisco is virtually inconceivable.⁴⁵⁵ The SFNAACP's insistence that it could represent the entire class effectively only compounded the difficulties of this choice of class. Simply the lack of a stipulated set of findings of discrimination (which might well have had to be left undone to reach a settlement in 1983) opened the decree to collateral attack under *Croson*.⁴⁵⁶ The combination of factors left the decree primed for an assault for which there was no real defense.

452. See *San Francisco NAACP*, 59 F. Supp. 2d at 1031. The school district's chief counsel in the San Francisco cases has worked on school desegregation matters since 1969 and has been involved in over two dozen desegregation cases nationally. See Uradnik, *supra* note 4, at 123.

453. See *San Francisco NAACP*, 59 F. Supp. 2d at 1030 (noting that parties had identified 70 witnesses and over 3,000 exhibits). I will leave it to others to review the record of the case and make a more objective assessment of the written work on file and the strategic choices made by all the lawyers in this case.

454. See *id.* at 1038–39.

455. Given the way they chose to structure the suit, the SFNAACP would have had to prove the seemingly impossible: that the local and state defendants discriminated against all groups in the district, including white children. Cf. *Croson*, 488 U.S. at 506 (observing that "(t)he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination") (footnote omitted); *Wygant*, 476 U.S. at 284 n.13 (noting that "(t)he Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan") (internal citation omitted); see also Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 EMORY L.J. 791, 818 (1993) ("Multicultural advocates who see the benefits to all students of cross-cultural education based on mutual respect and admiration by both racial groups will find little help in the Supreme Court's school desegregation jurisprudence.") (citation omitted).

456. See 488 U.S. at 498 (1989) (asserting a "generalized assertion" of past discrimination does not meet the justificatory burden for a government-imposed racial quota).

The dilemma created by the Supreme Court through its jurisprudence in this area did not make the defendants' task any easier. Bradley Joondeph has done a fine job of summarizing the nature of the problem in a recent review essay.⁴⁵⁷ By emphasizing a compensatory model of justice, Professor Joondeph shows that the Supreme Court "has caused courts and litigants to engage in a discourse of nonsense."⁴⁵⁸ The district courts have to assess whether the various facets of the school district's operations, the *Green* factors, differ from what they would have been had the district never engaged in discrimination years before.⁴⁵⁹ When the alleged injury is systemic, such as an alleged reduction in student achievement, "it borders on the absurd" to try to determine whether the existing levels of achievement would have been different had the school district never been segregated.⁴⁶⁰

Because they had no benchmark of *de jure* segregation, the defenders of the consent decree in *Ho* faced a devilishly difficult problem in establishing precisely how the San Francisco school district erred. They first had to establish the existence of intentional discrimination on a massive scale with evidence that was at least fifteen years stale, then they had to justify the plan as "narrowly tailored" when it was patently obvious that it was designed for an entirely different purpose, and *then* they had to prove vestiges.⁴⁶¹ Is it any wonder the decree's defenders gave up when trial was staring them in the face?

457. See Joondeph, *supra* note 28, at 217–22 (reviewing GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)).

458. *Id.* at 219.

459. See *id.* at 219 n.306 (citing *Freeman*, 503 U.S. at 503 (Scalia, J. concurring) ("Racially imbalanced schools are . . . the product of a blend of public and private actions, and any assessment that they would not be segregated, or would not be *as* segregated, in the absence of a particular one of those factors is guesswork.")); see also Alfred A. Lindseth, *A Different Perspective: A School Board Attorney's Viewpoint*, 42 EMORY L.J. 879, 882 (1993):

In reality, school boards have little—or nothing—to do with most of the school segregation that lingers today Where one-race schools persist today, they do so because of housing patterns, with little or no causal relationship to the former dual school system. Therein lies another problem for plaintiffs. Because only *de jure* segregation violates the Constitution, plaintiffs face the difficult burden of convincing courts that what is in reality *de facto* segregation is really *de jure* segregation caused at least in part by school authorities. In most cases, before an objective judge, plaintiffs simply cannot satisfy that burden.

460. Joondeph, *supra* note 28, at 220; see also Parker, *supra* note 197, at 520 ("insurmountable task"); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 763–64 (1991) ("chimerical").

461. Even if the SFNAACP were grudgingly willing to take on this task (though they continued in trying to convince the district court until the eve of trial that they should not have to shoulder this burden), the school district showed no appetite for it. See Jenkins, *supra* note 122, at 306–16 (discussing reasons why a governmental defendant might not enthusiastically take on such a burden because of "liability concerns, administrative and fiscal considerations, and political pressures").

Yet another possible avenue of further research would be a comparison of the nature and quality of the expert evidence⁴⁶² generated in *Ho* and *SFNAACP* with the evidence of vestiges of discrimination presented in other cases to determine if the defenders of the consent decree might have done a better job in marshalling evidence. For example, the First Circuit's opinion in *Wessmann*⁴⁶³ closely examines the evidence presented in the unsuccessful defense of the racially and ethnically conscious admission policy at Boston's examination schools, including the Boston Latin School. The circuit court majority rejected the statistical and anecdotal evidence presented in support of the policy by the Boston School Committee and accepted by the district court.

The circuit court explained that it did not find statistical evidence addressed to the factually unquestioned "persistent achievement gap at the primary school level between white and Asian students, on the one hand, and black and Hispanic students, on the other," sufficient to support an inference that *de jure* discrimination caused the small number of African American and Hispanic students in Boston Latin and the city's other examination schools.⁴⁶⁴ The court demanded more than a correlation to prove causation.⁴⁶⁵ It rejected the evidence presented on "low teacher expectations," primarily because the expert relied on research he had conducted in the Kansas City school system to opine on the existence of vestiges of discrimination in Boston without first locally collecting reliable data.⁴⁶⁶ The court also rejected anecdotal evidence as an "unsubstantiated

462. This includes not only evidence presented in court hearings, but also the material contained in the myriad of expert reports prepared for the court by the state monitor, the advisory committee, and the experts anticipated to be called at the trial of *Ho*.

463. 160 F.3d 790 (1st Cir. 1998) (demonstrating the careful examination of evidence undertaken by both the majority and the dissent).

464. *Id.* at 802–03. The majority rejected the School Committee's reliance on cases applying a statistical inquiry in employment discrimination cases where "we know *ex ante* the locus of discrimination: it is the barrier to entry." *Id.* at 803. In comparison, the School Committee was certainly not attacking its own use of standardized achievement test scores and an entrance examination; indeed, it relied on those scores to attempt to prove the alleged discrimination. The dissent approved of the district court's use of the employment discrimination analogy.

465. "We do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena." *Id.* at 804.

466. The expert had conducted a "climate survey" and multiple regression analysis of teacher attitudes in Kansas City. He sought to demonstrate his thesis that teacher "efficacy," how well a teacher encouraged pupils to succeed, correlated with higher achievement test scores. He conducted no comparable study in Boston, however, and "freely conceded that the data he used was not of the quality necessary to satisfy the methodological rigors required by his discipline." *Id.* at 805. The court noted that this "evidence" failed to meet the standards for expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It would now also be held to violate *Kuhmo Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) (extending *Daubert* criteria and analysis to testimony based on any kind of expert knowledge). See generally 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1-1.0 (Supp. 2000).

recollection of past events,"⁴⁶⁷ as well as assertions that unstable leadership and the absence of uniform curriculum standards had some relation to discrimination or to the achievement gap.⁴⁶⁸ Opinions from school desegregation cases in other parts of the country contain equivalent data and evidence that bear comparison and study in another forum.⁴⁶⁹

C. The Myth of the Desire for Return to Local Control

In its recent school desegregation opinions, the Supreme Court has emphasized the need for the return of the public school systems to the control of local officials, who presumably know best what the community wants and are politically accountable for their decisions.⁴⁷⁰ According to this dogma, "returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."⁴⁷¹ The opinions assume that the school districts are yearning to return to the halcyon era of local control without federal judicial interference. Under this assumption, it makes perfect sense to place the full burden of proof on the school district to demonstrate that it is ready to return to unitary status and to be freed from the shackles placed upon its decision-making by the federal court.

In *Ho*, however, this is the *last* thing the school district wants.⁴⁷² Under the court's jurisdiction and supervision, the leaders of the school district get to avoid making hard choices. They can respond to parents who complain about school assignments, "Sorry, it's that consent decree." They say the same thing to teachers' unions who complain about reassignment of

467. *Wessmann*, 160 F.3d at 806; accord *United States v. City of Yonkers*, 197 F.3d 41, 53 (2d Cir. 1999) (citing *Wessmann* in finding anecdotal evidence of low expectations to be legally insufficient).

468. See *Wessmann*, 160 F.3d at 807.

469. See, e.g., *City of Yonkers*, 197 F.3d 41 (2d Cir. 1999) (reversing finding of discrimination based on evidence regarding curriculum and teaching techniques, low teacher expectations, and educational achievement test data and remanding for further examination of the question of vestiges of *de jure* segregation); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537 (7th Cir. 1997) (reviewing admissibility of social science data offered to quantify causes of the achievement gap); *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3d Cir. 1996) (affirming findings that poor performance and achievement gap in Wilmington, Delaware, schools were caused by socioeconomic factors and not by past discrimination); *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (assessing evidence regarding whether previously segregated system had eliminated vestiges to the extent practicable), *stay granted*, 1999 U.S. App. LEXIS 34574 (4th Cir. 1999). See generally *ARMOR, FORCED JUSTICE*, *supra* note 305 (reviewing evidence from several school desegregation cases).

470. See, e.g., *Missouri v. Jenkins*, 515 U.S. at 88; *Dowell*, 498 U.S. at 247; *Freeman*, 503 U.S. at 489.

471. *Freeman*, 503 U.S. at 490.

472. For example, *Uradnik*, *supra* note 4, at 123, states that, in a 1996 interview, the district's chief counsel "admitted that he did not think that judicial supervision of the district had any stigma attached to it, and he claimed that he never gave a thought to when the decree should end." Indeed, within days of the hearing at which Judge Orrick formally approved the settlement, the superintendent of schools suddenly announced that he was leaving to take another position because San Francisco had become "a routinized, monotonous opportunity." Julian Guthrie & Emily Gurnop, *Schools Shocker: Rojas Quitting*, S.F. EXAMINER, Apr. 23, 1999, at A1.

its members.⁴⁷³ And, because of California policy, so long as the school district is under court order, it is entitled to a large infusion of state aid, amounting to tens of millions of dollars to San Francisco's schools.⁴⁷⁴ Given all the advantages, no one should be surprised to know that the school district has acted as if it would be delighted to stay under federal court supervision in perpetuity.⁴⁷⁵

Unless a court is vigilant to ensure that any case before it is still truly adversarial, parties who find a decree mutually beneficial can maintain it in perpetuity. In the case of the *SFNAACP* action, before the *Ho* suit commenced, the existing parties and the Advisory Committee had vested interests in keeping the suit alive.⁴⁷⁶ No one wanted to ask the court to declare: "It is finished."⁴⁷⁷ Until *Ho* had been litigated for several years, the court was not inclined to declare an end to the consent decree either.⁴⁷⁸

473. See Uradnik, *supra* note 4, at 112 (discussing how the proponents of the controversial policy of reconstitution of schools derive "political capital and political cover" from acting as if the consent decree and the court mandated the policy).

474. See *id.* at 134 ("the decree's funding approach has created a situation in which both plaintiffs and defendants [in the *SFNAACP* case] share an interest in its continuation"); accord *Jenkins*, 515 U.S. at 99 (noting that school district becomes more and more dependent on state funding as the district court imposes more and more remedial programs).

475. This is not an unheard of phenomenon in institutional reform litigation, of course. See, e.g., Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2012 (1999) ("The result of a consent decree can be more resources and freedom from entrenched restrictions on changes in policy and practice."); Mark Kellar, *Responsible Jail Programming*, AM. JAILS, Jan.-Feb. 1999, at 78 ("We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We 'cussed' the federal courts all the way to the bank."); David I. Levine, Book Review, 34 HASTINGS L.J. 1325, 1336 n.58 (1983) (citing other sources making same point). Justice Powell once questioned whether there was a real case or controversy if the defendant was not sufficiently opposed to the plaintiff's goals in the litigation. See *Milliken v. Bradley*, 433 U.S. 267, 292 (1977) (Powell, J., concurring).

476. See Uradnik, *supra* note 4, at 126 (noting "an attitude prevalent among consent decree supporters—that they will use the consent decree as they see fit until the court tells them otherwise"). This is not to say that the consent decree has not been of benefit to the school district as a whole:

Despite the critics, the fact remains that with the decree the district was able to invest in new facilities, better-trained staff and specially-developed programs. It used consent decree funds to decrease class size and increase the number of teachers and teachers' aides. It provided the district's children with state-of-the-art classrooms, magnet schools offering specialized instruction and training and more and better college preparatory high schools Thousands of students over the years have enjoyed what the consent decree has bought.

Id. at 130. The problem is that these benefits came at the price of the constitutional rights of thousands of children.

477. Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 798 (1986) ("[A]t some point—perhaps in words that could connote either triumph or despair—the court will come to say: it is finished.").

478. The court once mentioned it had the power to terminate the decree sua sponte. See *Ho*, 965 F. Supp. at 1327 n.15 (while denying summary judgment to *Ho* plaintiffs). It never actually made any effort to exercise that power, however. Compare Uradnik, *supra* note 4, at 135:

The experience in San Francisco suggests that the judicial system needs additional safeguards beyond mere reliance on the court and parties to nudge institutional reform cases toward their eventual termination.⁴⁷⁹ Perhaps legislative adaptation of portions of the Prison Litigation Reform Act⁴⁸⁰ to the school desegregation context presents a possibility for additional safeguards.

The PLRA is designed to address many problems Congress saw in prison condition cases.⁴⁸¹ The PLRA includes a generous right of intervention as one solution to those perceived problems. It grants standing to "any state or local official including a legislator or unit of government

Judge Orrick used the power of the judiciary to protect a bargained-for agreement that was structured and implemented to subvert political processes to achieve particular policy goals. Judge Orrick's decision to refrain from active participation except to protect the decree did not contribute to the success of implementation, but detracted from it. By choosing to defer extensively to the parties and experts, and by insisting on quiet, behind-the-scenes monitoring, he missed the opportunity to provide much-needed oversight and accountability for the decree. By denying motions to intervene and moving slowly on the collateral attack, he insulated the decree from changes both in law and circumstance and further augmented the already substantial powers of the parties to dictate the terms of implementation.

479. This assumes that federalism, including the value of minimizing federal court intrusion into local affairs, is an important policy, which is worthy of support. Certainly the Supreme Court under Chief Justice Rehnquist thinks so. *See, e.g.,* Joondeph, *supra* note 28, at 198–200 ("Perhaps the current Court's defining theme has been its renewed emphasis on the constitutional limitations of federal power and the independent sovereignty of state governments.") (citing cases and scholarship on this issue). Not everyone agrees that this is an important, or even real, value in the federal courts. *See, e.g.,* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 171–203 (1998) (discussing the "complete" judicial rejection of federalism); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999) (critiquing possibility of the application of a principled doctrine of federalism); Parker, *supra* note 197, at 539–42 (questioning local control and federalism as goals).

480. 18 U.S.C. § 3626. Eight of the circuit courts to have examined the termination provisions of the PLRA have held them to be constitutional. *See Berwanger v. Cottey*, 178 F.3d 834, 839 (7th Cir. 1999); *Nichols v. Hopper*, 173 F.3d 820, 823 (11th Cir. 1999) (citing holdings of six other circuits). The Ninth Circuit is the only appellate court that has addressed the termination provisions of the PLRA and not upheld them. A panel of the Ninth Circuit found the PLRA to be unconstitutional as applied to pending prison decrees. *See Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998). However, the opinion was vacated when the case was re-heard en banc. The circuit, by a 6-5 vote, did not reach the constitutional issue because of mootness. The court split 5-5, with one judge not reaching the issue, on the constitutionality of the PLRA. *See* 181 F.3d 1017 (9th Cir. 1999). The Supreme Court of the United States has decided to review whether the automatic stay provision of the PLRA is subject to the application of equitable considerations, and if it is not, whether the statute violates principles of separation of powers. *See French v. Duckworth*, 178 F.3d 437 (7th Cir.) (holding PLRA does not permit application of equitable considerations, and as such violates separation of powers principles), *cert. granted*, 120 S. Ct. 578 (1999).

481. *See, e.g.,* Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraint on Federal Legislation that Displaces Consent Decrees*, 77 WASH. U.L.Q. 53 (1999); Catherine G. Patson, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329 (1997) (all discussing Congress' motivations for passing the PLRA).

whose jurisdiction or function includes the appropriation of funds for . . . prison facilities" to intervene as of right to oppose the imposition or continuation of relief or to seek its termination.⁴⁸² Statutory creation of a comparable right to intervene in school desegregation cases would encourage another source of interested parties to call problems to the attention of a court that might otherwise be tempted to look the other way in the name of doing good.⁴⁸³ Giving these officials a right to intervene would help get around the problem of facing a judge whose attitude was "Stay out of my lawsuit!"⁴⁸⁴

The termination standard in the PLRA also might be adapted to the school desegregation context. The PLRA provides that defendants or intervenors are entitled to immediate termination of prospective relief if the relief was granted "in the absence of a finding by a court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."⁴⁸⁵ As an exception, relief will not terminate if the court makes written findings based on the record that prospective relief was still necessary under this standard.⁴⁸⁶ Parties or intervenors may seek such review regularly; in general, the PLRA permits an annual review.⁴⁸⁷

Application of a similar standard and periodic review to the San Francisco schools cases could have been helpful. The court would have needed to regularly issue written findings showing the consent decree was still necessary to correct current and ongoing violations of federal rights and did so in a narrowly tailored and least intrusive fashion. It is difficult to believe that the consent decree as approved in 1983 could have withstood such periodic scrutiny. This would have been especially true after 1993, because desegregation had been largely achieved on a school-by-school basis in the decree's first ten years; the focus had shifted away from desegregation and more toward the amorphous and never-ending goal of academic excellence for all children. The court would have been forced to periodically defend the legitimacy of the consent decree, especially as the Supreme Court made its views about termination of school desegregation decrees and race-based programs more and more clear in the late 1980s and early 1990s. The district court would not have had the luxury to act as if the consent decree were presumptively valid simply because it had been approved after a Rule 23 fairness hearing.⁴⁸⁸ If such

482. 18 U.S.C. § 3626(a)(3)(F).

483. Jenkins, *supra* note 122, at 318 n.269, in his recent article strongly supporting intervention as of right in defense of civil rights remedies notes that "one need not support affirmative action in order to embrace the intervention analysis" he proposes. He supports intervention for those who wish to protect their independent interests.

484. I assume that all the requirements of Rule 24(a) would have to be met.

485. 18 U.S.C. § 3626(b)(2).

486. *See* 18 U.S.C. § 3626(b)(3).

487. *See* 18 U.S.C. § 3626(b)(1)(A); *see also Berwanger*, 178 F.3d at 838 (7th Cir. 1999) (suggesting that statute would not be constitutional absent limitations on when parties or intervenors may demand review).

488. *See Uradnik, supra* note 4, at 125–26 (Because it "was not grounded in substantive law or derived from findings of legal violations, the decree itself became the law to

rights and standards had been in place, they might have substituted for the fact that the school district was uninterested in playing its assigned role of a party eager to obtain termination of the decree.

Some would surely observe that imposition of this standard in San Francisco would have led the school district to return even earlier to local control, with the concomitant loss of significant funding from the state.⁴⁸⁹ The proponents of using the consent decree as a handy spigot for funds, however, would do so at the expense of the constitutional rights of the *Ho* class, if not all the school children of San Francisco.⁴⁹⁰ As an important mentor to me, the late Judge Alvin B. Rubin once put it:

Constitutional rights are not, of course, confined to those available at moderate costs. The very concept of federalism . . . and the nature of the safeguards imposed by the Bill of Rights and the fourteenth amendment levy costs impossible for the accountant to calculate, but esteemed by us because they are literally priceless.⁴⁹¹

Admittedly, tens of millions of dollars per year are at stake for the school district. Even assuming that all of the money has been wisely spent,⁴⁹² the proponents of using the decree for the pragmatic purpose of acquiring money from the state would trade the constitutional rights of each child in the school district for a few thousand dollars per year.⁴⁹³ Each of us can decide if the bargain the proponents seek to defend is appropriate.⁴⁹⁴

In addition, the parties may not have needed to make the choice. There is reason to believe that state funding might continue even after termination of the decree.⁴⁹⁵ For example, on the day the settlement was

be enforced by the court." However, "the decree did not provide much of a guide to the judge for evaluating the shortcomings or abuses of implementation.")

489. See, e.g., Diane T. Chin, *End of Decree Hurts Chinese American Children*, S.F. CHRON., Mar. 17, 1999, at A17 (current executive director of Chinese for Affirmative Action criticizing settlement for causing loss of state funding).

490. They also overlook that if the San Francisco school district gets money to which it is not entitled, state taxpayers are being needlessly burdened or the money is not available for other purposes.

491. *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983) (quoted in David I. Levine, *The Seven Virtues of Judging: Alvin Rubin's Civil Rights Opinions*, 52 LA. L. REV. 1499, 1504 (1992)).

492. But see *supra* note 88 (Lawrence and Uradnik criticisms).

493. I have heard this referred to as "busing for dollars." Neither the children nor their parents are ever asked if they would be willing to trade in their rights so that the school district can have a little more money. Needless to say, no proponent of the decree has ever suggested that the parents and children be paid some compensation for the infringement of their individual constitutional rights in the name of the greater good. See also Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 933 (1996):

It is one thing for whites to make other whites pay for discrimination committed by whites for the benefit of whites, even though the particular individuals who pay may not have perpetuated or directly benefited from that discrimination. It is far less appetizing for whites to say minorities should suffer to compensate other minorities for those wrongful acts.

494. See Farber, *supra* note 3, at 894 n.3 (observing that the affirmative action debate boils down to whether the end justifies the means).

495. See Uradnik, *supra* note 4, at 71 (noting that in an interview, Gary Orfield had pointed out that the state funding for Los Angeles's school desegregation effort continued

announced in February 1999, a powerful member of San Francisco's delegation to the State Assembly was quoted as saying that she would try to get the money in the state capital to replace the money being lost as a result of the termination of the consent decree at the end of 2002.⁴⁹⁶ Since San Francisco's elected officials are currently in good stead with the governor, and the state is enjoying a strong economic boom, it should be easier than it might otherwise be to arrange substitute funding in the state budget.⁴⁹⁷ Thus, even the pragmatic argument that demands thousands of children to sacrifice their constitutional rights so the school district can keep a particular source of funding may be unnecessary.

D. *Ho* and the Affirmative Action Debate

The affirmative action debate will continue to roil. Within the debate, other scholarly writers have advised and/or criticized the *Ho* plaintiffs and their attorneys for the positions they have taken in this suit. It seems fitting to provide some thoughts in reply, although I do not expect to change anyone's mind.⁴⁹⁸ Perhaps those writing in the future about the *Ho* case will address the issues in light of the factual and legal context I have provided here.

1. *Ho* and the Position of Asian Americans in the Debate over Affirmative Action

Some writers have criticized the *Ho* plaintiffs as setting back affirmative action merely by filing their civil action.⁴⁹⁹ Yet consider the *Ho* litigation in light of an essay published only a few years ago by four Asian

even after termination of its decree). There is what is called voluntary desegregation money available from the state, although the funding formulas are not as generous as for implementation of court-ordered desegregation plans.

496. See Julian Guthrie, *What S.F. Gave Up to Settle Race Suit*, S.F. EXAMINER, Feb. 17, 1999, at A1 (quoting State Assembly member Carol Migden, "[W]e will work together as a Legislature to find ways to make sure San Francisco continues to receive the support it requires. It won't necessarily be a straight-forward formula like it is now, but there are ways to subsidize the district without pushing hot-button issues of race."); see also Venise Wagner, *End of Race Decree Sparks Ideas to Aid Black Youth*, S.F. EXAMINER, Apr. 19, 1999, at A1 (quoting school board member, "The challenge of the next few years is to develop some legislative strategies that are targeted toward specific programs that can make a difference.").

497. See Robert Salladay, *The City Fattens Up on Davis' "Pork,"* S.F. EXAMINER, Nov. 7, 1999, at A1.

498. See, e.g., Farber, *supra* note 3, at 893 (asserting that affirmative action debate is a "bitter stalemate"); Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1000-02 (1998) ("lack of movement by proponents on both sides is surprising"); Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 697 (1999) (book review):

Facts have never played much of a role in the affirmative action debate. Most of the books and articles written on affirmative action are intended primarily to demonstrate some particular allegiance rather than to add anything to a contentious debate, and facts are seen as either irrelevant or as tools to manipulate in support of an ideologically motivated position.

499. See, e.g., Der, *Asian American Factor*, *supra* note 5; Liu, *supra* note 3; Yamamoto, *supra* note 4; Dong, *supra* note 4, at 1045 n.110.

Pacific American legal scholars who presented their case for why "APAs must stand up for affirmative action."⁵⁰⁰ Although one can assume that the authors would never purport to claim that their views represent those of all APA legal scholars,⁵⁰¹ their joint position is expressly intended to blend a defense of affirmative action with a recognition of the unique place of Asian Americans in U.S. society. In this light, it seems useful to compare the position they espoused in *Beyond Self-Interest* with what the Ho plaintiffs tried to accomplish.

Beyond Self-Interest begins with a defense of a sweeping definition of affirmative action.⁵⁰² After carefully making most of the standard arguments for affirmative action,⁵⁰³ the article turns to the question of APAs and affirmative action. The authors give many examples of historic discrimination against APAs.⁵⁰⁴ After debunking the "model minority myth,"⁵⁰⁵ *Beyond Self-Interest* presents examples of present day discrimination against APAs.⁵⁰⁶

500. Chin et al., *supra* note 3, at 131. The article notes that the four authors, Gabriel Chin, Sumi Cho, Jerry Kang, and Frank Wu, represent "diverse ethnic backgrounds, political viewpoints, and scholarly methods." *Id.* at 130. The article has been reprinted and distributed to "elected officials, community leaders, civil rights organizations, educational institutions, and the media." *Id.* at 129 n.t.

501. See, e.g., Kang, *supra* note 3, at 41 (disclaiming that there is "an essentialist Asian American viewpoint"). For discussion of the development of Asian American legal scholarship, see ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW AND THE NATION-STATE* 45-106 (1999); Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993), 1 ASIAN L.J. 1 (1994); Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385 (1999). But see Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994) (criticizing Chang); *Colloquy*, 81 IOWA L. REV. 1467 (1996) (eight scholars criticizing Chen, followed by Chen's reply).

In addition, it is true that the terms "Asian American" and "Asian Pacific American" are sweeping constructs. See Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 28 (1994) (terms encompass at least 16 different ethnic groups, with origins in Asia, the Pacific Rim, and the Pacific Islands). Nevertheless, I am following what appears to be current conventional usage.

502. The authors define affirmative action to "refer to a broad array of race-, ethnicity-, and gender-conscious programs, enacted by the government and private sector, voluntarily or by court order, to promote equality of opportunity and racial diversity." Chin et al., *supra* note 3, at 133.

503. The arguments they make are sub-titled: "Affirmative Action Remedies Racial Discrimination," *id.* at 131; "Affirmative Action Creates a Better America," *id.* at 134; "The Costs of Affirmative Action are Acceptable," *id.* at 136; "The Merit Critique Is Muddy," *id.* at 137; and "Race-Consciousness is Not Racism," *id.* at 141.

504. In this section, the sub-titles include: "The Law Explicitly Discriminated Against Asian Immigrants," *id.* at 143 (documenting discrimination in immigration and citizenship), and "APAs Suffered as Second Class Aliens," *id.* at 145 (documenting *de jure* and *de facto* discrimination, particularly in California).

505. *Id.* at 148.

506. See, e.g., "Stereotypes Plague APAs," *id.* at 152; "APAs Suffer From Employment Discrimination," *id.* at 153; "APAs are Victims of Racial Violence," *id.* at 157.

The authors then introduce three possible regimes of how to treat APAs in the debates about affirmative action.⁵⁰⁷ *Beyond Self-Interest* distinguishes among "affirmative action," "neutral action" and "negative action." The authors would include APAs in affirmative action in race-based programs where APAs are under-represented.⁵⁰⁸ They argue that "neutral action" should be employed in a situation where APAs do not warrant special consideration, and are properly treated no differently from other groups, typically whites, who are not included in the affirmative action program at issue.⁵⁰⁹ In contrast, "negative action . . . favors Whites over APAs," such as when a university imposes an admissions quota on APAs.⁵¹⁰

Beyond Self-Interest accepts that in particular situations, it may be legitimate to treat APAs under either a regime of affirmative action or neutral action.⁵¹¹ However, "it is never appropriate to treat them with negative action."⁵¹² The authors then advise, "APAs who are harmed by an explicit program of negative action can and should protest and file lawsuits, which they should win under current anti-discrimination laws."⁵¹³ Negative action, of course, is what the *Ho* plaintiffs endured under the consent decree, without legal justification.⁵¹⁴ They challenged the negative action by using the exact tools, and in the exact order (protest and then lawsuit) that *Beyond*

507. See *id.* at 159. This section seems based on the work of one of the co-authors. Cf. Kang, *Negative Action*, *supra* note 3.

508. The authors caution that "the ultimate decision is case-specific and fact-intensive," but in cases of under-representation of APAs "some cogent explanation must be offered for their exclusion." Chin et al., *supra* note 3, at 159; see also Robert Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1128 (1996) (pointing out that the relative success of some Asian American groups in obtaining admissions to elite educational institutions should not obscure the different situation for other Asian American groups and that affirmative action is still necessary for Asians Americans where they face discrimination in hiring and promotion); Chew, *supra* note 501, at 28 (not all Asian Americans excel in college and in employment settings); Gee, *supra* note 3, at 650 (affirmative action serves the interest of Asian Americans who are poor and have somewhat lower grades and test scores).

509. Chin et al., *supra* note 3, at 23. One assumes the authors mean that the affirmative action program in question is itself based on an adequate legal and factual predicate. Cf., e.g., Oppenheimer, *supra* note 7, at 933 ("affirmative action that includes race-conscious decision-making is legitimate if, and only if, it is used as a remedy for discrimination. Absent evidence of discrimination for which a present remedy is appropriate, race-conscious decision making is always impermissible.").

510. Chin et al., *supra* note 3, at 159.

511. For this reason Chin et al. contend, "APAs can play an extraordinarily powerful role in the debate because they can declare their support for the programs even when they are not directly benefited by them." *Id.* at 160. In contrast, other writers claim that such a position is not tenable. For example, Henry Der, a persistent critic of the *Ho* plaintiffs, has accused some local supporters of the suit of hypocrisy for seeking affirmative action in local employment. See Der, *supra* note 5, at 17-18.

512. Chin et al., *supra* note 3, at 159.

513. *Id.* (emphasis supplied).

514. For example, one of the named plaintiffs in *Ho* was a teenager who would have gotten into Lowell High School had he been white, Japanese, Korean, indeed any race or ethnicity except Chinese. Cf. Chin et al., *supra* note 3, at 159 (negative action "means that at least one APA will be denied admission, although if she were White, she would have been admitted").

Self-Interest suggests.⁵¹⁵ Throughout the suit, the *Ho* plaintiffs have attempted to eliminate negative action against Chinese Americans. They have also attempted to ensure that the school district will engage in neutral action toward all races and ethnicities⁵¹⁶ and engage in affirmative action only with respect to less controversial criteria, such as socioeconomic status and language proficiency.

2. Settlement

Several writers have importuned the *Ho* plaintiffs to settle the case earlier.⁵¹⁷ For example, one student writer urged the *Ho* plaintiffs to settle the entire case when the admissions plan for Lowell High School was changed slightly.⁵¹⁸ This writer did not seem to appreciate that the revised plan had to operate in light of the consent decree-mandated quota for Chinese students at Lowell. She did not address the legality of the race-based aspects of the revised admissions system.⁵¹⁹ Nor did she seem to understand the thrust of the suit, which was directed at the system-wide discrimination and not the admissions practices at only one high school. A small change in admissions at Lowell had no impact on the more than 100 other schools in the district, which would have continued to utilize quotas and race-based admissions.

Moreover, those urging settlement seemed not to know or care about the efforts of parents and their supporters to reach an accommodation prior to initiating litigation. Perhaps one can argue whether the parents should have tried even harder before contacting lawyers. One taking that position, especially from afar, needs to explain how any other actions posed a realistic chance of success in light of what the parents actually tried.

Moreover, it takes two to tango. Those who have urged from the sidelines that the *Ho* plaintiffs settle on unfavorable terms so as not, in the critic's view, to harm unduly the law of affirmative action should have directed those concerns to other parties involved in the case.⁵²⁰ Perhaps

515. The authors also call upon conservatives "to cease using APAs as their 'racial mascot' to arrogate moral authority in furtherance of regressive policies." *Id.* at 161 (citation omitted). As indicated above, although conservative groups did not initiate, fund, or direct the *Ho* suit, some conservative politicians have certainly been cheerleaders for it. Counsel for the *Ho* plaintiffs have made no effort to seek political support from conservative groups, however. The primary political support for the suit stems from the Chinese American Democratic Club of San Francisco.

516. See Kang, *supra* note 3, at 45; Wu, *supra* note 3, at 284 (both, in effect, calling for end to negative action at Lowell High School).

517. See, e.g., Liu, *supra* note 3, at 350; Yamamoto, *supra* note 4, at 824; Dong, *supra* note 4, at 1031; Shin, *supra* note 4, at 223.

518. See Shin, *supra* note 4, at 223.

519. See *supra* note 147 (describing changes in admissions at Lowell in 1996).

520. Cf. Symposium, *Rethinking Racial Divides—Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 198, 198–204 (1998) (remarks of Gabriel J. Chin, arguing that "one of the most serious threats to affirmative action is presented by people who are supposed to be its supporters," and explaining why the Universities of Texas and Michigan should not have continued to defend affirmative action admissions policies at respective universities); accord Gary Orfield, *Campus Resegregation and Its Alternatives*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 1, 12 (Gary Orfield & Edward Miller eds., 1998) ("Too many selective public universities did not create" a process incorporating the *Bakke* model properly,

the SFNAACP and the SFUSD should be taken to task by affirmative action supporters for their unwillingness to accept that *Ho* was a case that ought to have been settled promptly and quietly. As demonstrated above, courts recognized time and again that the position of the defenders of the consent decree was extremely weak on legal and factual grounds. In addition, the structure of the *Ho* case—quite intentionally—did not leave the defenders on strong moral ground. They had to demand that people who, as a group, unquestionably had endured *de jure* segregation in California,⁵²¹ pay a price so that others—who had not proven in court that they had suffered from similar treatment at the hands of the school authorities—could get a benefit.⁵²² Defenders of affirmative action would have done well to use their ability to network within the civil rights community to urge the SFNAACP and the school district to treat the *Ho* case like *Taxman v. Board of Education*,⁵²³ which was settled after the Supreme Court accepted the case for review, for the common good of affirmative action.⁵²⁴ In any event, the *Ho* plaintiffs did settle, albeit after the writers published their advice. For a variety of reasons, the parties⁵²⁵ were not ready, collectively, to settle until the legal issues were resolved and the trial was impending.

It is difficult to see how the actual settlement can be said to have harmed the law of affirmative action, even from the point of view of de-

leaving the admissions standards particularly vulnerable to challenge); Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1391 (1999) (arguing that those who defend policies not even defensible under *Bakke* leave the “moral high ground” to others and that “pretending that the process has not operated as it has subjects each participant to a reign of uncertainty within which professed academic values ring hollow in the light of lingering uncertainties about precisely what and who a university values”).

521. See, e.g., *Ho*, 147 F.3d at 864 (“If such a system of group surrogation prevailed, the Chinese schoolchildren of San Francisco would have an excellent case for preferences compensating for earlier wrongs.”).

522. It is questionable whether some of those desired benefits were even delivered. The achievement levels of black and Latino students have not risen in the school district, as had been hoped.

523. 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997) (affirming damages awarded white school teacher laid off on the basis of race instead of equally qualified black schoolteacher).

524. See, e.g., Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999); Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMPLOYMENT L. 229 (1998); Matthew S. Lerner, Comment, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement*, 47 BUFF. L. REV. 1035, 1046–49 (1999) (all discussing role of civil rights leaders and organizations in snatching the case from the jaws of defeat); accord Uradnik, *supra* note 4, at 329–30 (“Had the parties [to the Consent Decree] been responsive, and incorporated [the demands of Chinese American parents] into the decree in a thoughtful and meaningful way, the legality of the decree probably would not have been called into question, and the later years of implementation would not have proceeded under a cloud of controversy.”).

525. One must remember that in this case each party, with the exception of the state superintendent of public instruction, is actually an entity. Each entity, such as the SFUSD school board, for example, is composed of individuals with different views. This, of course, did not simplify the process of achieving the proper conditions for a settlement.

fenders of race-based versions of the policy.⁵²⁶ In terms of the strategy espoused in *Beyond Self-Interest*, the *Ho* plaintiffs challenged a regime of negative action against children of Chinese descent that could not be justified under the Constitution of the United States. Furthermore, in settlement, the attorneys for the *Ho* plaintiffs have not opposed the school district's desire to create a new regime of affirmative action using legal methods that target children needing help. If the school district authorities do the preparatory work and think creatively, they should be able to gain approval of a new, race-neutral plan that will achieve meaningful diversity and extend a helping hand to deserving people of all races.⁵²⁷

Although the settlement bans race-conscious assignment "criteria" (or means), it affirms the appropriateness of "residential, geographic, economic, racial and ethnic diversity" as "considerations" (or goals) within the limits provided by state and federal law.⁵²⁸ The school district may redraw school boundaries—again, within constitutional limits—to foster more integration and to use socioeconomic and ability factors to help children of all races and ethnicities.⁵²⁹ One can quibble whether one provi-

526. I would venture that their real complaint is with the course of affirmative action law under the Rehnquist Court, not with the legal and factual arguments presented on behalf of the *Ho* class. Cf., e.g., Yamamoto, *supra* note 4, at 844–52; Liu, *supra* note 3, at 349. One must also recall that the suit was settled within the shadow of Proposition 209, now Article I, § 31 of the California Constitution. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997) (holding Proposition 209 to be constitutional). Once the court terminates supervision in 2002, the school district's assignment policies will have to conform to Proposition 209. Thus, it only makes sense to strive to have whatever plan is created now, while still under the court's protective shield, also be impermeable to attack under Proposition 209's race-neutral mandate. Otherwise, the school district will have to fend off further challenges or get yet another plan through the political process in a few, short years.

527. Compare Wu, *supra* note 3, at 284 ("Affirmative action, in the end, is only a means. . . . The appropriate response to opponents of affirmative action is the query, real rather than rhetorical, of how they might propose to achieve racial justice by other means."), with *San Francisco NAACP*, 59 F. Supp. 2d at 1033 (in approving *Ho* settlement, court discussed proposed testimony of state superintendent's expert that it was "possible to devise a student assignment system using a combination of individual and census-derived socioeconomic factors to assure reasonable socioeconomic diversity at each school, which would not result in the ethnic resegregation of the schools").

528. *San Francisco NAACP*, 59 F. Supp. 2d at 1025 (¶ C).

529. The authors of *Beyond Self-Interest* express some skepticism about whether class-based affirmative action is a right-wing "ruse." They note, however, that a "genuine commitment to class equality would lead one to target resources at an individual's formative years." Chin et al., *supra* note 3, at 161. Given that the *Ho* suit is about assignment to public schools, starting with kindergarten, this doubt should be assuaged. Also, one should recall that the *Ho* plaintiffs have been careful not to intrude on the prerogatives of the school district to set the assignment rules. Thus, the establishment of the new rules is left with the elected decision-makers who, in San Francisco, at least, are representative of the local population.

Lest anyone forget the unique context of San Francisco's political scene, at this writing local voters have just decided to reelect Mayor Willie Brown, an African American and a 7.0 on the Richter scale of liberalism among politicians in the United States. Mayor Brown's run-off challenger, whose politics are even further left, was the gay president of the city's board of supervisors. See, e.g., Martin F. Nolan, *San Francisco Mayoralty Race Is Taking on the Look of "Rocky,"* BOSTON GLOBE, Nov. 24, 1999,

sion or another in the settlement reached an ideal balance of interests. Any thoughtful critic must assess the settlement in light of the factual and legal posture of the entire case.

3. *The Structure of the Ho Suit*

Some have criticized the structure of the *Ho* suit and therefore the legal arguments used in support of the plaintiffs' claims. As discussed above, the lawyers for the class, myself certainly included, chose to frame the suit to illustrate the harms children of Chinese descent endured under the consent decree. The class the court certified consisted of children of Chinese descent eligible to attend San Francisco's public schools. This was a deliberate strategic choice, based on the context of having to challenge a long-standing consent decree duly approved in the *SFNAACP* suit on behalf of a class consisting of all children in San Francisco. It seemed better at the time of filing in 1994 to frame the suit on behalf of a single class of students already defined within the terms of the consent decree, rather than to diffuse the claim by stating that the suit was brought on behalf of all students who were harmed by the decree.⁵³⁰ This seemed especially true in light of the then-recent rebuff to other groups who had tried to intervene.⁵³¹ Another advantage to keeping the class narrow was that it made it easier to organize support within the Chinese American community of San Francisco.⁵³² Finally, it provided the advantage of promoting the interests of a class of people who unquestionably had suffered *de jure* segregation in California and whose constitutional rights were being harmed without any proof that the harm was being inflicted to correct a legally cognizable injury to others.

The major downside of this strategic choice was that it left the *Ho* plaintiffs vulnerable to the charge that the case pitted Chinese Americans

at A23 ("But race and sexual orientation matter less than ideology, which defines and envelops San Francisco more powerfully than any metropolis west of Havana."). The seven members of the elected school board include African American, Latino, Chinese American, and white members. Two different African Americans on the board have served as its president. The acting superintendent of schools is an African American woman; her two immediate predecessors have been Latino. The elected board of city supervisors is similarly diverse and representative of the city's population.

530. For example, it would not have been surprising to discover African American and/or Latino parents willing to let their children also serve as class representatives. Cf. CHINESE AMERICAN DEMOCRATIC CLUB, EQUITY AND EXCELLENCE, *supra* note 97, (showing that in 1993, 21 schools in the SFUSD were capped out for Spanish-surnamed students and 14 schools were capped out for black students).

531. At the oral argument on the motion to certify the class, in response to a question from the court, the attorneys for the *Ho* plaintiffs offered to also represent other people who were harmed by the consent decree. The court chose to certify the class of children of Chinese descent only, without mentioning the oral offer. Personal observation. The *Ho* plaintiffs sought to revisit that decision in early 1999 by moving to realign the class representation in the *SFNAACP* case, so that the *Ho* plaintiffs could represent all students who were harmed by the decree. See *San Francisco NAACP*, 59 F. Supp. 2d at 1031. The motion was withdrawn once the case was settled.

532. See, e.g., Liu, *supra* note 3, at 349 (noting the suit's effect on the "mobilization of Chinese American participation in the political and judicial process").

against other minority groups.⁵³³ Had the context been different, it might well have made sense to structure the case differently, to press harder and earlier for a redefinition of the SFNAACP and *Ho* classes into those supporting and those opposing the consent decree, or to seek out other subclasses of students whose interests in portions of the consent decree might be somewhat different.⁵³⁴ It is impossible to know now whether it might have been feasible to have enjoyed the advantages of both approaches.⁵³⁵

Professor Eric Yamamoto, the primary academic critic of the structure of the suit,⁵³⁶ has also expressed disappointment in the nature of the legal

533. See, e.g., Keith Aoki & Margaret Chon, *Critical Race Praxis and Legal Scholarship*, 5 MICH. J. RACE & L. 35, 46 (1999) ("A lot of Asian Americans who are aligned with the goals and ideals of the African American-catalyzed civil rights movement did not know how to deal with *Ho*."); Yamamoto, *supra* note 4, at 823 ("Plaintiffs' strategy of distancing Chinese Americans from African Americans is reflected not only in statements of supporters but also in plaintiffs' legal filings."); YAMAMOTO, *supra* note 4, at 30 (repeating same statement). A similar division has occurred in the related context of university admissions policies. See TAKAGI, *supra* note 113, at 176-77 (discussing "major rupture" between Asians and blacks as racial and ethnic politics changed over the issue) and at 191 (discussing black/Asian conflict over admissions as "fueled" by cultural and economic confrontations in certain U.S. cities).

534. Cf., e.g., Shauna I. Marshall, *Class Action as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U.S.F. L. REV. 911 (1995) (discussing use of multiple sub-classes of plaintiffs in discrimination suit against San Francisco Fire Department).

535. The attorneys for the *Ho* plaintiffs have made some efforts to minimize friction with the SFNAACP whenever possible. Thus, the *Ho* plaintiffs did not sue the SFNAACP originally. The state and local defendants insisted that the SFNAACP be added as a necessary party to the suit. See *supra* note 122. In addition, when negotiating a fee as prevailing party, the attorneys for the *Ho* plaintiffs offered not to seek fees from the SFNAACP, even though they had actively litigated the case in opposition. See Letter from Robin B. Johansen to Counsel (Feb. 19, 1999). No one had an interest in trying to bankrupt the local NAACP through collection of a substantial attorney's fee award. The perception of outsiders might have been different had the SFNAACP representatives not rebuffed the entreaties of the representatives of the Chinese American community before the *Ho* litigation commenced.

536. I should note that Yamamoto's description of the *Ho* suit and its potential effects are not quite accurate. For example, his description of the case focuses almost exclusively on Lowell High School, with no recognition that the consent decree reached all the other schools in the system and that those schools did not use test scores for admission. Yamamoto charges that there is a Chinese/superior, others/inferior cast to the suit, which is not to be found anywhere in the *Ho* plaintiffs' filings in the extensive record of this now-six-year-old case. See YAMAMOTO, *supra* note 4, at 30. He contends that the *Ho* plaintiffs have asserted that the claims of Chinese Americans "are contrary to the interests of African American students represented by the NAACP," when the SFNAACP was formally given responsibility for representing *all* students in the district. His quotation from the complaint that the "NAACP 'did not adequately represent' Chinese Americans in the original desegregation action," while accurate, is not accompanied by an explanation that this is the legal formula used in a collateral attack on a decree. Yamamoto also makes rather sweeping claims about the potential effects of the suit. For example, he claims, without explanation, that "[a] likely longer-term consequence may be the legal dismantling of all race-based affirmative action programs in the state." *Id.* at 31. He says another "probable consequence" of the case will be to "affirm in the public mind the image of Asian American superiority and African American and Latina/o inferiority." *Id.*; see also Yamamoto, *supra* note 4, at 823-24 (repeating same statements). I hope that it is not too much to request accuracy from an academic calling for "critical inquiry and constructive discussion" of an already complex matter. YAMAMOTO, *supra* note 4, at 32.

arguments made on behalf of the *Ho* plaintiffs. It seems he would have preferred the litigation to proceed using the theories and insights developed in critical legal and race studies.⁵³⁷ Professor Yamamoto's admirable aim is to put critical theory to practical use in achieving racial justice.⁵³⁸ His suggestions for achieving interracial justice might well be an interesting and fruitful method to discuss the underlying issues at an AALS, SALT, or other law school workshop,⁵³⁹ or perhaps even in a forum where members of different races could meet to discuss grievances in relative calm.⁵⁴⁰

I will readily plead *nolo contendere*, however, to the charge of choosing to frame a law suit, brought on behalf of a large class of children and filed in the United States District Court for the Northern District of California, in terms of applicable legal precedent decided by the Supreme Court of the United States.⁵⁴¹ It is unlikely that Judge Orrick or the appellate courts

537. For example:

Noticeably absent from litigation strategy and legal discourse is critical inquiry into the connection between law and racial hierarchy, including Asian Americans' purported role as "middle minority" buffers in the continuing subordination of African Americans; the political construction and implications of meritocracy and colorblindness in the affirmative action debate, including the meaning of objectivity and race consciousness; the dissonant understandings of "equality-under-law" (equality-of-opportunity, equality-of-result, and anti-caste); and the sharp limitations of legal process for subordinated communities seeking racial justice, including the general failure of legal norms, methods and procedures to foster intergroup healing.

Yamamoto, *supra* note 4, at 825–26. Similar comments appear in his book. See YAMAMOTO, *supra* note 4, at 29–33.

538. See YAMAMOTO, *supra* note 4, at 129; Yamamoto, *supra* note 4, at 875; see also Raneta Lawson, *Critical Race Theory as Praxis: A View from Outside the Outside*, 38 HOW. L.J. 353, 369 (1995), cited in Yamamoto, *supra* note 4, at 834 n.51 (calling for critical race theory to address real-world concerns and to transform theory into practice); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42 (1992) (disjunction between legal education and practice of law "is most salient with respect to scholarship"). Cf. Yamamoto, *supra* note 4, at 834 (quoting political lawyer who finds "progressive race theory ideas and writing" to be "intriguing but not particularly helpful").

539. See *Nanook of the Nomos: A Symposium on Critical Race Praxis*, 5 MICH. J. RACE & L. 35 (1999) (including festschrift for Professor Yamamoto).

540. See, e.g., YAMAMOTO, *supra* note 4, at 210–75 (providing examples of successful and unsuccessful attempts at racial reconciliation in Hawaii, Los Angeles and South Africa); see also Frank H. Wu, *A New Thinking About Affirmative Action*, HUM. RTS., Summer 1999, at 19 (calling for less debate about affirmative action in favor of a concentration on the realities of racial discrimination).

541. Cf. Yamamoto, *supra* note 4, at 828 (criticizing the *Ho* plaintiffs for an "awkward embrace of a constricted civil rights law paradigm" that Yamamoto says "generate[s] confusion and anger . . . about the purpose of antidiscrimination laws and about *Ho*'s social meaning and impact"). But see Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 104–05 (1999) ("Who can say that when one group . . . presses a perspective on its own subordination that its reasons for doing so are not legitimate, that it does so to oppress others, or that its refusal to acknowledge any subordinating effect on other groups amounts to power evasion or irresponsibility?"); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 225–26 (1999) ("The acceptance of representation narrows an attorney's options substantially It may well be too much to ask an attorney after ac-

would have been particularly moved by briefs and motions addressed instead to "critical inquiry into the interminority dynamics at the heart of the case."⁵⁴² Professor Yamamoto recognizes that it would be very difficult to adapt his ideas to the San Francisco situation. Even though the *Ho* case serves as a paradigmatic example in both his article and book, Yamamoto does not explain exactly how his concept of critical race praxis⁵⁴³ could have been realistically employed to solve the problem in San Francisco.⁵⁴⁴ On the other hand, with the case hopefully winding down, an opportunity may be available now for the parties to begin taking small steps to achieve the sort of reconciliation Yamamoto urges.

4. *Visions of Justice*

Another complaint that has been lodged against the *Ho* case is that it is really all about getting a few more Chinese American students into Lowell High School, and that they shouldn't be so greedy.⁵⁴⁵ Henry Der,

cepting a case to consider all the possible conflicting interests. This, however, is precisely what Professor Yamamoto seems to advocate.").

542. YAMAMOTO, *supra* note 4, at 32. I doubt that the defenders of the consent decree would have been any more successful in the courts with this strategy either. Cf. Caldwell, *supra* note 541, at 102 ("nothing in Professor Yamamoto's description suggests that the narrow issue before the court is illuminated in any meaningful way or should necessarily be expanded by the interminority dynamics he describes").

543. He explains,

Critical race praxis, with its emphasis on critical pragmatism and multidisciplinary, suggests reconfiguring notions of legal justice to encompass racial community understandings of conflict, redress, and healing—understandings illuminated by a mix of law, history, theology, social psychology, political theory, and ethnic or indigenous cultural practices; understandings that play out in the daily practices of business, bankruptcy, labor, landlord-tenant, immigration, and family law as well as evidence and procedure.

Yamamoto, *supra* note 4, at 885; see also YAMAMOTO, *supra* note 4, ch. 6 (discussing "race praxis").

544. In the most explicit passage on this issue, Yamamoto recognizes that it would take

more than rewriting the history of public school segregation, formal desegregation, and changing demographics since the original consent decree It also entails the recasting of culture-laden images of African Americans as intellectually inferior and Asian Americans as yellow peril/model minorities hidden just beneath the surface of the case discourse about merit, qualifications, and affirmative action preferences

YAMAMOTO, *supra* note 4, at 201. I suggest that this is more freight than one lawsuit (even one inspired by the insights of critical race praxis) can carry. Cf. Caldwell, *supra* note 541, at 104 ("Unfortunately, [Yamamoto's application of critical praxis to *Ho*] is largely descriptive, replaying his account of the differential power relationships involved in [the] conflict"); Robert S. Chang, *Facing History, Facing Ourselves: Eric Yamamoto and the Quest for Justice*, 5 MICH. J. RACE & L. 111, 129 (1999) (book review) (Yamamoto "does not guide us . . . which is unfortunate because the Lowell case is where his guidance is especially needed").

545. See, e.g., Der, *supra* note 5, at 14–15; Emil Guillermo, *A Loser-Like Way to Get Into Lowell*, ASIANWEEK, Mar. 4, 1999, at 4; Gary Orfield, Report on the Proposed Settlement (Apr. 15, 1999), attached as Ex. A to Order, at 8, *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, (N.D. Cal. Apr. 16, 1999) (No. C-78-1445-WHO) (contending that the *Ho* plaintiffs did not represent the interests of less affluent Chinese in favor of "a small group of high achieving Chinese students excluded from par-

for example, argues that “applicants who are not admitted into Lowell, more often than not, have other choices, either in public schools or in the independent sector.”⁵⁴⁶ Der points out that Patrick Wong, a named plaintiff, who was turned down at Lowell because he was Chinese American, eventually got into his fourth choice school. For Der, “it is arguable whether the Consent Decree racially-based enrollment guidelines denied [him] access to a school of choice.”⁵⁴⁷

One response to this argument is that no one should be turned away from something they want and are otherwise eligible to have on the basis of race alone, absent a compelling justification based on strict scrutiny. Obviously a scarce public good, such as the limited places at desirable schools, has to be allocated in some way. Not every individual will obtain her preferred school. The question is how those decisions can be made on a fair and legal basis.

Der’s assertion that the *Ho* case is about how much is “enough” for one racial or ethnic group illustrates yet another aspect of the case. Everyone in the San Francisco school desegregation case is pursuing justice in accordance with his or her own values.⁵⁴⁸ The case involves deeply held principles on all sides. One way of thinking of the difference in jurisprudential terms is to view the defenders of the consent decree as pursuing distributive justice,⁵⁴⁹ and the *Ho* plaintiffs as pursuing a different vision of justice.⁵⁵⁰

The defenders of the consent decree use arguments much like those used to defend affirmative action more generally. They speak of the benefits the consent decree has brought to all school children in San Fran-

ticular schools”). Der also coupled his contention about the *Ho* suit with the assertion that the affirmative action debate at the University of California is about nothing but getting a few more Asian American students into UCLA or Berkeley at the expense of members of other minority groups. See Der, *supra* note 5, at 15–16.

546. Der, *supra* note 5, at 14.

547. *Id.* Der also contended that Chinese students were not turned away from San Francisco’s schools in disproportionate numbers. See Revised Expert Witness Statement of Mr. Henry Der, Deputy Deputy [sic] State Superintendent of Public Instruction, Education Equity, Access and Support Branch at 4–6, *Ho v. San Francisco Unified Sch. Dist.*, (N.D. Cal. filed Feb. 3, 1999) (No. C-94-2418-WHO). Similarly, Der argued that Asian students should not complain about being turned away on the basis of race from UC Berkeley or UCLA, the flagship undergraduate institutions of the University of California, because they will get into one of the other UC campuses. See Der, *supra* note 5, at 16. But see TAKAGI, *supra* note 113, at 72–74 (discussing Der’s role in mid-1980s, challenging admissions policies at UC Berkeley that were “being manipulated to keep our numbers down” (quoting Der)).

548. “[T]he Court has no doubt that all of the parties are trying to act in the best interests of the students of San Francisco.” January 2000 Memorandum Decision, *supra* note 401, at 7.

549. See, e.g., Gewirtz, *supra* note 477, at 731 (1986) (under distributive justice, “racial justice under the Constitution is understood as a specific racial distribution—for example, a representation of the races in proportion to their representation in the population”); see also Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

550. Cf. TAKAGI, *supra* note 113, at 180 (“The course of the shifting debate in which minorities, university officials, and neoconservatives sought to define the central focus of Asian admissions [at universities] suggests the importance of viewing discursive practices as contingent on struggles between competing political perspectives.”).

cisco.⁵⁵¹ They speak of "inclusiveness," and point with pride to the significant integration that has occurred at the school level and with dismay at what they see as insufficient balancing of races and ethnicities at the level of classrooms and programs.⁵⁵² The proponents of the consent degree do not perceive the tie to vestiges of past *de jure* segregation as an important issue, because their goals of racial balance at all levels in the district and excellent academic achievement for all students have not yet been met. As Robert Chang has put it, those who would defend an affirmative action program "characterize it as necessary to equalize opportunities for racial minorities."⁵⁵³ The defenders' concept of a fair distribution of the scarce public good is "located within an expansive temporal framework that allows consideration of the history of racial and gender oppression in addition to ongoing racial and gender discrimination."⁵⁵⁴

In contrast, the *Ho* plaintiffs are not rejecting distributive justice entirely, as some might charge.⁵⁵⁵ The *Ho* plaintiffs seek to determine: (a) which institution of our government may properly utilize distributive justice as a motivating force; and (b) what legal limits concern the implementation of that goal.⁵⁵⁶ The *Ho* plaintiffs have sought a return to local control of the schools to the district officials and have not sought to impose a particular set of criteria for assigning students to schools.⁵⁵⁷ In effect, the *Ho* plaintiffs are saying that the proper place to seek distributive justice is in the school district itself, with policy set within legal limits⁵⁵⁸ by an elected school board that is highly representative of and responsive to San Francisco's populace.

The visions of the *Ho* plaintiffs and the defenders of the consent degree clash when the latter use the federal court to impose their specific view of distributive justice on everyone in the school district. The *Ho* plaintiffs, on the other hand, believe that the Supreme Court has made it

551. See text accompanying *supra* notes 52–66.

552. See, e.g., 1999 Advisory Committee Report, *supra* note 272.

553. Chang, *supra* note 111, at 1117 (citing Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986)).

554. *Id.*

555. See Der, *supra* note 5, at 15; cf. Chang, *supra* note 111, at 1117 ("The forces that would destroy affirmative action offer a competing notion of fairness located within a narrow temporal framework that allows consideration only of the immediate parties to the transaction in question.").

556. "The parties agree that a diverse student body is educationally desirable. They dispute only the narrow issue of whether the New Plan is a legal means of attempting to achieve a diverse student body." January 2000 Memorandum Decision, *supra* note 401, at 7.

557. In contrast, some prevailing plaintiffs in institutional reform litigation see their role as governing the institution and closely monitoring the defendants' performance in many areas. See, e.g., Ross Sandler and David Schoenbrod, *Government by Decree*, CTRY J., Summer 1994, at 54, 61 (describing a consent decree implementation process whereby board of education attorneys report to plaintiffs' attorneys in closed meetings scheduled every other week).

558. As the district court observed in rejecting the proposed new plan, "It goes without saying that the [School] District must always comply with the Constitution." January 2000 Memorandum Decision, *supra* note 401, at 28. "It is true that, by settling the case, the *Ho* plaintiffs gave up the right to challenge the legality of the then-existing student assignment plan The *Ho* plaintiffs never gave up the right to challenge the legality of those future assignment plans, however." *Id.* at 16.

abundantly clear that the proper role of the federal courts is to pursue corrective justice,⁵⁵⁹ not distributive justice.⁵⁶⁰

In this case, however, the *Ho* plaintiffs are not seeking corrective justice for themselves.⁵⁶¹ They do not seek what one would normally expect under this theory: monetary compensation or a remedial program to rectify any wrong done to them. Rather, in acknowledging the proper role of the federal courts in achieving corrective justice, the *Ho* plaintiffs are asking the federal court to follow the tenets of the corrective justice model. Thus, the federal court should be involved in the San Francisco schools only if there is an identified, constitutionally cognizable harm, and if the intervention of the court continues to be required in order to correct that harm.⁵⁶² Under this vision of corrective justice, court-ordered remedies may be aimed only at that limited purpose. Further, courts may not approve or require race-conscious remedies unless the requirements of strict scrutiny are met.⁵⁶³ Otherwise, the *Ho* plaintiffs think children should be treated as individuals, not according to whether their skin color or ethnicity will contribute to someone's notion of the ideal distribution of races and ethnicities.

The settlement the *Ho* plaintiffs negotiated in 1999 reflects this vision of justice. The settlement reflects a philosophical shift away from the distributive justice solution embodied in the 1983 consent decree, which used quotas and required minimum numbers of ethnic groups in each school, to achieve a certain vision of justice. However, in forcing the abandonment of the distributive justice solution the parties to the *SFNAACP* action negotiated and the court approved in 1983, the *Ho* plaintiffs did not use the settlement simply to replace one distributive solution for another more beneficial one.⁵⁶⁴ Instead, the settlement sub-

559. Kent Roach explains *corrective justice* as follows:

[C]orrective justice promises . . . full correction of the constitutional harms that the state has caused its citizens. Full correction means restoration of a notional status quo *ante*, by which the victims of illegal conduct are returned to the position they occupied before the wrong, and those responsible for the wrong are made to bear the burden of restoration.

Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991). As Professor Gewirtz has put it, "the assumption that corrective steps will be bounded in duration is at the core of what justifies the liberties of the corrective period, such as the courts' displacement of the usual institutions of policy making and administration in a locality . . ." Gewirtz, *supra* note 477, at 789.

560. The Supreme Court embraced the theory of corrective justice for school desegregation cases at least as far back as 1968. See Levine, *supra* note 112, at 627–28.

561. Cf. *Ho*, 147 F.3d at 864 (observing that if the proper compensation for past group harm was giving an advantage to a group's descendants, "the Chinese school children of San Francisco would have an excellent case for preferences").

562. Cf. *id.* at 865.

563. Cf., e.g., *id.*

564. In contrast, a possible distributive justice solution to the pressures created by the changing demographics in San Francisco would have revised the list of recognized racial and ethnic groups and raised the quotas by a few percentage points. The settlement that the defendants proposed to the court in the fall of 1998, dropping fixed quotas in favor of "significant numbers of no less than six racial/ethnic groups," constitutes another possible solution that is plainly motivated by distributive justice.

stituted another vision of justice entirely, one that places its faith in the abilities of the officials entrusted with running the school district to exercise authority fairly and to pursue diversity—broadly defined, but even including considerations of race and ethnicity to the extent permitted by federal and state law—through the use of legal mechanisms.⁵⁶⁵

V. CONCLUSION

In approving the *Ho* settlement, Judge Orrick aptly began his opinion with a quotation from President John F. Kennedy: "All of us do not have equal talent, but all of us should have an equal opportunity to develop our talents."⁵⁶⁶ Judge Orrick graciously noted, "In an effort to provide equal opportunity for San Francisco's 65,000 schoolchildren of exceptionally diverse origins, the parties in these two related desegregation cases have strenuously endeavored to achieve President Kennedy's goal, albeit from often sharply differing viewpoints."⁵⁶⁷ This observation captures the nature of the dispute.

What gives the *Ho* case so much resonance is that this debate is being played out all over the country.⁵⁶⁸ Although the defenders of race-conscious distributive justice will certainly achieve some victories here and there,⁵⁶⁹ it seems fairly clear that this view is not going to prevail

The court rejected this proposed solution for, *inter alia*, failing the strict scrutiny test. Der's proposed solution to the dilemma of admissions to Lowell High School is yet another example. For Der, the Lowell issue was "easily resolved" by setting minimum academic qualifications for all racial groups and then employing a lottery within the quotas established by the consent decree. Der, *supra* note 5, at 14. The *Ho* plaintiffs rejected all of these types of solutions because they proposed using race without the legal predicate required by the principles of corrective justice the Supreme Court has espoused.

565. As the district court noted, the parties, including the *Ho* plaintiffs, did not take issue with the race-neutral portions of the school district's proposed student assignment plan. See January 2000 Memorandum Decision, *supra* note 401, at 7. In another portion of the opinion, after suggesting possible race-neutral student assignment plans, the court observed:

In developing either of these plans, the school district could lawfully consider the effect that these plans would also have on racial diversity, without having to satisfy strict scrutiny, as long as race was not the predominant factor in developing the plans. When race is used explicitly on the face of the plan, however, strict scrutiny applies.

Id. at 24.

566. *San Francisco NAACP*, 59 F. Supp. 2d at 1023.

567. *Id.*

568. See, e.g., Ben Wildavsky, *A Question of Black and White: Wrestling with Ways to Maintain Diversity*, U.S. NEWS & WORLD REP., Apr. 10, 2000, at 26; Jeffrey Rosen, *The Lost Promise of School Integration*, N.Y. TIMES, Apr. 2, 2000, §4, at 1; Amy Dockser Marcus, *The New Battleground Over Race and Schools: Younger Students*, WALL ST. J., Dec. 22, 1999, at B1; Steve France, *Recess for Diversity?: Parents Challenge Race-Based Magnet School Policies*, A.B.A. J., Mar. 1999, at 30.

569. See, e.g., *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (allowing UCLA's laboratory elementary school to utilize race-conscious admissions policy for research purposes); *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (allowing boot camp for youthful offenders to be race-conscious in making sure some African Americans are in positions of authority; collects cases allowing other race-conscious decisions in law enforcement and correctional hiring);

overall in the federal courts, at least, for anytime in the foreseeable future.⁵⁷⁰ As the era of court-ordered school desegregation comes to a close in the coming years, and the more general affirmative action debate is played out, we must continue to think of new ways of achieving equity and fairness in different situations.⁵⁷¹ *Ho* demonstrates how imperative it

Chicago Firefighters Union v. City of Chicago, No. 87-C-7295, 1999 WL 1289125, at *86 (N.D. Ill. Dec. 30, 1999) (race-conscious promotion plans in fire department upheld with "exceedingly persuasive" evidence); Note, *supra* note 98, at 940 (contending that certain race conscious admissions programs for elementary and secondary schools should withstand strict scrutiny).

570. *But see, e.g.*, TAKAGI, *supra* note 113, at 187 (observing that the "retreat from race" has been, in part, due to "a failure of liberal and left visions of racial politics"); Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296 (1999) (calling for reappraisal of the caste analogy and a look outside the U.S. for new ideas about affirmative action); Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a "Color-Conscious" Theory*, 13 HARV. BLACKLETTER L.J. 183, 184 (1997) (seeking "viable counter-theory to color-blind liberalism"); Killenbeck, *supra* note 520 (arguing for continued validity of diversity as a compelling interest in post-secondary education); Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparison*, 97 MICH. L. REV. 1311 (1999) (suggesting factual investigation of multiple approaches to affirmative action programs and consideration of experience in other nations); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (advocating use of anticaste principle as means to reformulate many parts of equal protection law); Symposium, *Affirmative Action: Mapping Out the Debate and Developing New Strategies*, 16 NAT'L BLACK L. J. 127 (1999); Erin E. Byrnes, Note, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535 (1999).
571. *See, e.g.*, Jorge Chapa & Vincent A. Lazaro, *Hopwood in Texas: The Untimely End of Affirmative Action*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 63 (Gary Orfield & Edward Miller eds., 1998) (despite following *Hopwood*, University of Houston Law School sustained proportion of admitted African Americans, increased the ratio of admitted Hispanics, and quadrupled the proportion of admitted students of other races, in part because of revised admissions procedures); Susan Wilbur and Marguerite Bonous-Hammarth, *Testing a New Approach to Admissions: The Irvine Experience*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 118 (Gary Orfield & Edward Miller eds., 1998) (after University of California at Irvine revised admissions criteria, "without the use of explicit racial standards, the new criteria resulted in the admission of a freshman class of approximately the same racial and ethnic composition" as the year before; moreover, "these admitted freshmen will presumably show a proclivity for greater involvement and participation in academic and social life on campus because of increased emphasis on these factors in the admissions process"); Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999) (new plan is promising, but in first year of operation, it did not significantly alter the minority enrollment at the University of Texas at Austin or at Texas A & M University); Kidder, *supra* note 3 (reviewing data from three University of California law schools, and challenging thesis that APAs are the primary beneficiaries of ban on race-conscious affirmative action); T. Vance McMahan and Don R. Willett, *Hope From Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163, 164 (1999) (coping with *Hopwood* is leading Texas to "a new vision based on affirmative opportunities for all instead of affirmative action for some"); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) (reporting on results of use of class-based preferences for admissions at UCLA School of Law); Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504 (1997) (contending that UCLA data show that for groups heavily dependent on race-based program, substituting class-based program is inadequate); Richard H. Sander, *Comment in Reply*, 47 J. LEGAL

is to create rules in the name of those laudable goals that also balance a complex variety of interests as we become an ever more multicultural and multiracial society.⁵⁷²

At this writing, the story in San Francisco is not finished. Unfortunately, the San Francisco Unified School District has not yet embraced the agreement it made with the other parties to achieve a fair *and* constitutional balance of these interests.⁵⁷³ I hope that the conflicts among the parties will be resolved appropriately and the school district will return to its primary job, educating children.⁵⁷⁴ I still anticipate that when the San

Educ. 512 (1997) (showing points of agreement and suggesting further research); Jodi Wilgoren, *Texas' Top 10% Law Appears to Preserve College Racial Mix*, N.Y. TIMES, Nov. 24, 1999, at A1 ("Two years into this startlingly simple top 10 percent program, the racial mix on this campus has been restored to what it was under affirmative action, and the [University of Texas at Austin] has also been able to attract students . . . from impoverished rural and inner-city schools that rarely sent graduates here before."); James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44 (discussing how University of California campuses, especially UC Riverside, maintain diversity without race-based admissions).

572. But see TAKAGI, *supra* note 113, at 191 ("the end of racial preferences [as] a step toward racial harmony and racial equality" is a "mistaken view . . . based on the assumption that racial differences are the product of racial preferences").
573. The school district filed a motion for modification of the court's January 2000 Memorandum Decision under Rule 59(e) of the Federal Rules of Civil Procedure, because it would like to be able to contend in the future that the settlement agreement allows "race-conscious remedies adopted for the purpose of complying with the requirements of California law" without also passing "federal Equal Protection scrutiny." Notice of Motion and Motion for Modification of Memorandum of Decision and Order Pursuant to Fed. R. Civ. P. 59(e); Memorandum of Points and Authorities, 4-5, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Feb. 2, 2000) (No. C-78-1445-WHO). The school district and the SFNAACP also filed protective notices of appeal, which the parties requested be kept in abeyance until the district court ruled on the motion. See SFUSD Notice, *supra* note 424; SFNAACP Notice, *supra* note 424. The school district subsequently withdrew the motion. See Stipulation and [Proposed] Order Withdrawing San Francisco Unified School District's Motion for Modification of Memorandum Decision and Order, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Apr. 12, 2000) (No. C-78-1445-WHO). The *Ho* plaintiffs assumed that if the motion had been heard, the district court would again have held that the Supremacy Clause of the U.S. Constitution governs. See *Ho*, 965 F. Supp. at 1323 n.6. At this writing, the school district and the SFNAACP have not indicated whether they intend to pursue their appeals from the January 2000 Memorandum Decision.
574. It is clear that the school board wants to continue to try to avoid racial isolation. See, e.g., Katherine Seligman, *S.F. Dropping Bid for Racial Criteria*, S.F. EXAMINER, Jan. 7, 2000 (school board vice-president promising, "We won't stay static."). The SFNAACP has recently filed its own proposal and asked that the parties consider it. See SFNAACP Ex Parte Motion for the Court to Consider the SFNAACP Student Assignment Proposal, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Jan. 5, 2000) (No. C-78-1445-WHO). The *Ho* plaintiffs replied that it was too late to consider their wide-ranging proposal for Fall 2000 admissions, which needed to be completed in a matter of weeks, in March; but some of the SFNAACP's ideas might influence the parties and the community for the following year's admissions cycle. See *Ho* Plaintiffs' Opposition to San Francisco NAACP's Ex Parte Motion Seeking Consideration of Proposal to Modify Proposed New Student Assignment Plan, San Francisco NAACP v. San Francisco Unified Sch. Dist., (N.D. Cal. filed Jan. 7, 2000) (No. C-78-1445-WHO). The court suggested that the SFNAACP needed to lobby the school district and the state superintendent to adopt its policy-based proposals. See January 2000 Memorandum Decision, *supra* note 401, at 38.

Francisco school desegregation consent decree reaches its termination at the end of 2002, the *Ho* case will be seen as the progenitor for a national model for how we can achieve President Kennedy's goal without trampling on anyone's constitutional rights.

